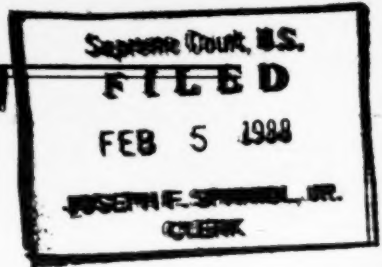


87-1309



No.

in the  
**Supreme Court**  
of the  
**United States**

October Term, 1987

SAMUEL SCALLIO,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

J. David Bogenschutz, Esq.  
KAY & BOGENSCHUTZ, P.A.  
Suite 4F  
633 SE Third Avenue  
Fort Lauderdale, FL 33301  
(305) 764-0033

*Of Counsel:*

Laurel W. Marc-Charles, Esq.  
Suite 1041  
1001 South Bayshore Drive  
Miami, FL 33131  
(305) 372-8954

129992



## QUESTIONS PRESENTED

1. Whether reversal was required under *Stromberg v. California*, 283 U.S. 359 (1931), where the Trial Court erroneously instructed the jury that it could consider non-Title 21 offenses as predicate violations in support of Petitioner's conviction under the Continuing Criminal Enterprise statute, and where insufficient other narcotics offenses resulted in guilty verdicts to demonstrate that the jury did not rely upon this erroneous charge?

2. Whether reversal was required, where the Trial Court impermissibly broadened the specific averments of the Continuing Criminal Enterprise count in the Indictment, in instructing the jury as to the possible bases for conviction thereunder?

3. Whether reversal was required, where the Government failed to prove, beyond a reasonable doubt, the supervisory or management role of Petitioner over five or more people, an essential element of the Continuing Criminal Enterprise charge?

4. Whether reversal was required because of the Trial Court's admittedly erroneous exclusion of two items of noncumulative impeachment evidence attacking the credibility of two critical Government witnesses?

5. Whether reversal was required because the Trial Court erroneously demanded Petitioner answer questions on cross-examination to which he had a valid right to assert the Fifth Amendment privilege?

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FOR THE FOURTH CIRCUIT**

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED  
STATES AND THE ASSOCIATE JUSTICES OF THE  
SUPREME COURT OF THE UNITED STATES:

Your Petitioner, SAMUEL SCALLIO, prays that a Writ  
of Certiorari issue to the United States Court of Appeals for  
the Fourth Circuit, to review its Opinion of September 9,  
1987, affirming Petitioner's convictions.

## **OPINIONS BELOW**

The Judgment and Commitment Order, recording the jury's verdict and sentence imposed, dated May 1, 1986, is attached hereto as Appendix B. The Opinion of the United States Court of Appeals for the Fourth Circuit, affirming Petitioner's conviction is unpublished, but a copy thereof is attached hereto as Appendix C.

## **JURISDICTION**

The Opinion of the United States Court of Appeals for the Fourth Circuit, affirming Petitioner's conviction was entered on September 9, 1987. Thereafter, a Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed, but denied on December 8, 1987. (A copy of this Order is attached hereto as Appendix D). In accordance with Rule 20, Rules of the Supreme Court of the United States, the instant Petition is filed within sixty days of the date rehearing was denied; or, on or before February 6, 1988. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:**

The pertinent constitutional and statutory provisions are reproduced in the Appendix, as Appendix A.

## **STATEMENT OF THE CASE**

### **Nature of Case and Its Disposition**

On October 2, 1986, a six-count Indictment was returned charging Petitioner, Samuel Scallio, with engaging in a Continuing Criminal Enterprise and other related offenses. A copy of the Indictment is attached hereto as Appendix E.

Mr. Scallio's wife, Patricia Scallio, was also charged with (and ultimately convicted of) the conspiracy charged in Count II of the Indictment. Mrs. Scallio does not petition this Court for review of her conviction in this or any separate Petition for Writ of Certiorari.

A variety of pre-trial motions were filed with the United States District Court, most notably a Motion to Dismiss and Bill of Particulars directed to the insufficiency of the Continuing Criminal Enterprise charge set forth in Count I. The Trial Court's denial of these motions, as well as its unprecedented amending of the Indictment's averments in its charge to the jury, as a result of its insufficiency, are issues raised herein.

On March 4, 1986, a jury trial against Petitioner (and his wife, who is not a Petitioner herein) commenced. As the Government rested its case, the Trial Judge conducted a colloquy with Petitioner, advising him of his right to testify or not, and the scope of cross-examination, should he take the stand in his own defense; and requesting notice of whether in fact he would be a witness in his own behalf. (See Appendix F). The resulting unconstitutional impact of the Trial Court's colloquy in this regard upon Mr. Scallio during his testimony is an issue raised herein.

During presentation of the defense case, the Trial Court prohibited two important items of proper impeachment, relating to Mrs. Jacqueline Grimes—one of the only two witnesses to provide testimony of direct contact with Mr. Scallio in drug dealings—and to her husband (a nonappearing declarant). These evidentiary rulings are also issues raised herein.

Timely motions for judgments of acquittal were made after the Government's case in chief, and after conclusion of all of the evidence, but were denied. On March 18, 1986, the jury rendered its verdicts. Petitioner, Samuel Scallio, was acquitted of Count V (the Distribution of Cocaine charge), but was convicted of Counts I, II, III, IV and VI. (Appendix B) The propriety of denying motions for judgments of acquittal, as well as the insufficiency of the evidence to support the jury's verdict as to Count I, also represent issues raised herein.



Petitioner, Samuel Scallio, was sentenced on May 1, 1986, to a total of 35 years and a fine of \$100,000. (Appendix B). He is presently serving his sentence.

A timely notice of appeal was filed. Upon appeal, the United States Court of Appeals for the Fourth Circuit affirmed by unpublished opinion, dated September 9, 1987 (Appendix C). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, but denied on December 8, 1987 (Appendix D). The instant petition is taken to review this denial of Rehearing and the Opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's convictions.

### **Statement of Facts**

The key issues raised herein rest factually on the interrelationship of the averments to the Indictment, the evidence at trial, the instructions to the jury and the factual basis for the Fourth Circuit's affirmance. As a result, and in an effort to ease this Court's review hereof, we have set forth the facts in those subsections below.

#### **A. The Indictment**

The six-count Indictment in this case (see Appendix E) charged Mr. Scallio with engaging in a Continuing Criminal Enterprise (Count I), a Conspiracy to Distribute and Possess with the Intent to Distribute Cocaine (Count II), and four substantive counts, all related in the Overt Acts set forth in Count II as part of the conspiracy charge (see Count III, the use of a telephone to facilitate the charges in Counts I and II; Count IV, travel from Mr. Scallio's home in Alabama to Maryland on December 5, 1984, to promote, manage, establish and carry on the unlawful activity charged in Count II; Count V, distribution of cocaine on December 5, 1984, in Maryland; and Count VI, using intimidation and threats against Charles Eugene Perry, Jr., to hinder, delay and prevent the communication of information relating to the commission of a criminal offense).



The Continuing Criminal Enterprise (CCE) charge in Count I, merely tracked the language of the statute; the only factual allegations contained therein setting forth the duration of the charge from "prior to 1982 . . . up to and including December 6, 1984," and identifying the predicate violations that Mr. Scallio was alleged to have committed thereunder as those alleged "in Counts II and V of this Indictment . . ."

Because the CCE charge, *inter alia*, thus explicitly alleged only two predicate violations instead of the three or more required to fulfill the "continuing series" element of the offense, a pre-trial Motion to Dismiss Count II was made, but denied.

Count II alleged that Mr. Scallio "would purchase large quantities of cocaine" from sources, including David Bruce Reimsnider and Nicholas Dezes, and would "pay other members of the conspiracy," including Alton Dewit Grimes and William Daniel Grimes, "to transport cocaine and cash for him." Count II also alleged that Mr. Scallio would thereafter "distribute large quantities of cocaine" to others in Maryland, including Edward Allen Phillips (a/k/a "Butch"), Charles Eugene Perry, Sr., and Michael Jerome Swidowich. The Overt Acts specifically alleged an arrangement to purchase cocaine from Reimsnider on March 27, 1983, by giving money to Alton Dewit Grimes and his wife, Jacqueline Grimes, with which money the purchase was allegedly to be made (Overt Acts 1, 2, and 3); a possession of cocaine by Perry, Sr., on December 15, 1983 (Overt Act 4); a possession of cocaine by Michael Jerome Swidowich on December 22, 1983 (Overt Act 5); a conversation between Mr. Scallio and Perry, Jr., in April of 1984 (Overt Act 6, also charged as a substantive offense in Count VI); a telephone call between Scallio and Phillips on December 4, 1984 (Overt Act 7, also charged as a substantive offense in Count II); and Mr. Scallio's travel to Maryland "to meet with" Phillips on

December 5, 1984 (Overt Act 8, also charged as a substantive offense in Count IV).

Of the remaining substantive counts in the Indictment, only two were violations of the narcotics laws; viz., Count II, which charged the use of the telephone on December 5, 1984, to facilitate the offenses charged in Counts I and II (21 U.S.C. Section 843(b) ); and Count V, charging a distribution of cocaine in Maryland on December 5, 1984 (21 U.S.C. Section 841(a)(1) ). Count IV charged travel in interstate commerce on December 5, 1984, in aid of racketeering (18 U.S.C. Section 1952(a)(3)) and Count VI, charged an obstruction offense related to the April, 1984 conversation between Mr. Scallio and Perry, Jr. (18 U.S.C. Section 1512).

## B. The Trial

At trial, no testimony was adduced to support 1) the allegation of possession of cocaine by Michael Jerome Swidowich on December 22, 1983, as part of the conspiracy with Scallio as set forth in Overt Act 5; or 2) the allegation of possession of cocaine on December 15, 1983, by Perry, Sr., as part of the conspiracy with Scallio set forth in Overt Act 4. In addition, the jury found insufficient evidence adduced at trial to establish any distribution of cocaine on December 5, 1984, and thus acquitted Mr. Scallio of Count V of the Indictment. Further, the testimony at trial demonstrated, in contradiction to the Indictment's averments, that Mr. Scallio had no knowledge of, or relationship with, the two alleged sources—Reimnsnider and Dezes—from which the Indictment alleged he purchased cocaine in between 1982 and 1984.

Indeed, the testimony, taken in the light most favorable to the Government, demonstrated that the Grimes' purchased cocaine which they in turn sold to Mr. Scallio, by obtaining a price from their ~~hidden~~ source (Reimnsnider), thereafter requesting the cash in advance from Mr. Scallio (in an amount which included a "commission" for themselves), with which they would then purchase the cocaine from Reimnsnider and later deliver it to Mr. Scallio. The Grimes carefully

guarded the identity of their source from Mr. Scallio, so they could assure that he must come to them for the purchase of cocaine, rather than going directly to the source; thereby establishing and maintaining only a buyer-seller relationship with Mr. Scallio at all times.

In fact, William Grimes and his sister-in-law, Jacqueline Grimes, were the only witnesses called by the Government who provided testimony alleging direct contact with Mr. Scallio regarding the purchase or sale of cocaine. Their testimony is summarized as follows.

### **1. Grimes Testimony**

Mrs. Grimes and her husband Pete (Alton) Grimes, had known Mr. Scallio for over twelve years. Pete Grimes had long been in the used car business, and had purchased cars wholesale from Mr. Scallio for some time. They later shared the same business location, the Grimes' having one office trailer from which they operated a retail used car business, and Mr. Scallio having another office trailer from which he operated a wholesale used car business. Pete (Alton) Grimes did not testify at trial.

William Grimes, a convicted felon, admitted poly-drug abuser and brother of Pete Grimes, did, however, testify at trial for the Government. He claimed that in late August or early September of 1982, William Grimes met with Mr. Scallio, together with his brother, Pete. William had met Mr. Scallio previously, as Mr. Scallio, at his brother's request, had initially assisted William in opening a video store.

William claimed that Mr. Scallio asked him and Pete whether they could sell him some cocaine. William knew a person by the name of David Reimsnider, whom he had known since 1979 as a dealer in cocaine, and he and his brother decided to use Reimsnider as their source to fulfill Mr. Scallio's alleged request. William testified that he and his brother did not tell Scallio from whom they were

obtaining their cocaine, because he would then no longer need them and they could be "cut out" of the deal.

In September of 1982, William stated that he—at his brother, Pete's, direction—delivered ½ lb. of cocaine to Mr. Scallio. A week or two later, they allegedly delivered a kilo of cocaine to Mr. Scallio; and two weeks thereafter, two lbs. of cocaine. William claimed that there was approximately three or four subsequent "deals" up to December, 1982; but stated that it was "only a feeling that it was still Sam Scallio" that they were selling it to, because after the two-lb. deal, he said that he no longer had any direct contact with Sam Scallio himself.

In and around December of 1982, Pete, his brother, told William that "Butch Phillips" (a long-time acquaintance of the Grimes and the Scallios, who also shared an interest in the used car business) didn't want William involved in this activity. William Grimes gave no explanation or detail about why Butch Phillips would make this comment; nor did he, during his testimony, state that Phillips was in anyway associated with Scallio in purchasing these drugs.

Pete's wife, Jacqueline Grimes, also testified for the Government. According to Mrs. Grimes—a convicted extortionist and drug dealer who testified at trial pursuant to a plea agreement for which she was given immunity in this case in exchange for her testimony—in the latter part of 1982, she was told by her husband that he had begun to participate in cocaine transactions with Mr. Scallio. Mrs. Grimes testified that around Christmas of 1982, at her husband Pete's direction, she picked up a gift-wrapped package from Sam Scallio; which her husband told her contained money. Pursuant to her husband's further instructions, she delivered this package to David Reimsnider.

In February of 1983, again at her husband's direction, she picked up money from Mr. Scallio; and this time, she watched the money being counted by Mr. Scallio. Following her husband's orders, she delivered this to David Reimsnider.

She was told by her husband that they were purchasing cocaine from Reimsnider with this money. Mrs. Grimes made it very clear that the drug purchase was not between Mr. Scallio and Reimsnider; but only between her husband and Reimsnider. Mrs. Grimes stated that some days after this second delivery of money to Reimsnider, her husband received a quantity of cocaine, which he told her was from Reimsnider. Carrying the cocaine in a gym bag belonging to her son, she claimed she and her husband took it to Mr. Scallio, where he examined it. The only comment that Mr. Scallio made to her about her involvement in these transactions was that she appeared to be "less obvious" than her brother-in-law, "Bill" (William) had been.

Mrs. Grimes also testified that on March 27, 1983, she again was instructed by her husband to go to Mr. Scallio's home, pick up some money and deliver it to Reimsnider, which she did. This time, however, her husband came up with an idea to change the plan of operation. He directed her to rent a hotel room, and told her that Reimsnider would deliver the cocaine to her at that location. Reimsnider never arrived and they later learned that he had been arrested. Mrs. Grimes stated that Mr. Scallio was unaware that they had been obtaining cocaine from Reimsnider, until after Reimsnider's arrest, at which time they gave Mr. Scallio Reimsnider's name and advised him about their previous transactions with Reimsnider. She knew of no other source that Mr. Scallio had for cocaine; and, after this aborted transaction, this ended his purchases from her husband. Furthermore, she stated that neither she nor Pete knew who Reimsnider's source was, until he had advised them after his arrest. At that time, Reimsnider told them he had been purchasing his cocaine from a Nicholas Dezes. She never gave the source's name to Mr. Scallio; and doesn't know whether her husband, Pete, ever did.

In addition to this testimony, the Government attempted at trial to link Mr. Scallio with numerous other drug



transactions, through a series of drug arrests of others, who did not know him.

## **2. Reimsnider/Dezes Transaction**

The first was a drug transaction between Reimsnider and Dezes on March 27, 1983, which led to Reimsnider's arrest and inability to meet with Mrs. Grimes on March 27, 1982, at the hotel in which she waited. Previous to this date, Dezes' agreed to cooperate with law enforcement, and set up a sale of cocaine which resulted in Reimsnider's arrest. Dezes testified at trial, but did not identify Mr. Scallio as any of his customers, and stated he did not know and had never met Mr. Scallio.

The Government also adduced evidence regarding an independent investigation of Butch Phillips.

## **3. Phillips Investigation, Seizures and Arrests**

Charles E. Perry, Jr., testified that in 1982, he and his father had been "distributing cocaine," which his father told him had been obtained from Butch Phillips. After his second arrest for cocaine possession on March 31, 1984, Perry, Jr., agreed, pursuant to a plea agreement, to cooperate with the police, despite his father's warnings not to do so.

Perry further stated that he knew the Scallios as they were acquaintances of his parents. He testified that in mid-April, 1984, he was visiting a friend at Ginos Auto Sales. Mr. Scallio arrived soon thereafter, presumably to visit Gino, and he and Scallio struck up a conversation, which was the basis for Count VI of the Indictment, upon which Mr. Scallio was convicted.

Further, several law enforcement officers testified about evidence gathered during the Phillips' investigation, via a wire tap placed on Phillips' phone, and the execution of search warrants on Phillips' residence in Maryland and other locations pertinent to that investigation.

Pursuant to information gleaned from the wire taps, law enforcement arrested Loyd Bruce Wagner on November 19, 1984, the evidence about which tended to show that the cocaine ultimately found in Wagner's possession came through Phillips or others that he directed. No charge or overt act in the Indictment alleged that either Mr. or Mrs. Scallio had any participation in this transaction.

Out of the 1,978 calls intercepted over Phillips' telephone, only eight of them contained conversations between Phillips and his long-time friend, Mr. Scallio, and only five of these eight were played by the Government for the jury. All of these calls occurred within a two-week period, and took place shortly after Mr. Scallio had moved from his long-time residence in Maryland (where Phillips continued to live) and had relocated in Fairhope, Alabama.

These conversations contained general discussions about cars—a business in which both Mr. Scallio and Mr. Phillips shared an interest—and comments about mutual acquaintances of theirs. It was the contention of the Government, as testified to through their case agent Special Agent Athas, that they were in fact “coded conversations” related to drug smuggling. Although Special Agent Athas was unable to “decode” all of the comments made therein, and while acknowledging that large portions of these conversations disclosed nondrug related matters, he pointed to several statements which he believed disclosed that 1) Scallio was concerned about certain individuals in the Maryland area who had been arrested, convicted or sentenced in drug cases; 2) that Phillips and Scallio discussed relatives of Phillips who Agent Athas was permitted to opine were involved in Phillips' drug network; 3) Scallio and Phillips discussed a possible use of a truck, which would be disguised, for something; 4) that they discussed the general condition of the smuggling business through comments about how the “business” was going and whether they had certain “cars” for sale and 5) that certain references in a conversation

between them on December 4, 1984 to either "4" or "5" related to a possible transfer of cocaine, to occur on December 5, 1984, and a veiled comment to Mr. Scallio's travel on that date. Further, Agent Athas claimed that these conversations demonstrated that Phillips considered himself to be supervised or managed by Mr. Scallio, as Phillips frequently concluded his conversations with him by calling Mr. Scallio "boss." Agent Athas, however, pointed out no part of any conversation in which Scallio gave any directions or orders to Phillips.

In addition to this testimony, the government offered into evidence certain items obtained from the execution of a search warrant on the Scallio residence on December 13, 1984. Specifically, the Government introduced into evidence a notebook, which they alleged to be a "drug ledger," certain loose papers, allegedly containing a formula for determining the purity of cocaine, a hot box, a money counting machine, a digital scale found in the kitchen, a chemistry set, a trace amount of cocaine inside a cap found in Mr. Scallio's office at home, and several guns.

The Government also introduced a boarding pass for a flight from Mobile, Alabama, showing the ticketed passenger to be Michael Higdon, Mrs. Scallio's brother. Sgt. Hidgon testified at trial that he never took that trip; and the Government argued to the jury that it had in fact been used by Mr. Scallio. Despite surveillance at the time the Government argued Scallio used this airline ticket, he was not seen by anybody anywhere consistent with his having taken this flight.

The Government's handwriting expert was unable to conclude whether the "drug ledger" was in Mr. Scallio's handwriting. Agent Athas—testifying as an "expert"—claimed that it appeared to contain information relating to the cost, amount, expenses, and profit of a cocaine business, but was unable to come up with a consistent explanation of what each item contained therein meant, or key the entries



to any date of any transaction about which there was testimony, except by referring to dates close in time thereto. The defense called John Holman of D & D Motors, who reviewed the ledger and stated that it appeared to be consistent with the type of "field notes" that are kept by used car wholesalers. Upon such mixed testimony, the ledger was nevertheless introduced into evidence.

Mr. Scallio took the stand and denied his involvement in drugs, by answering two questions put to him on direct. The Government was thereafter permitted to cross examine him extensively regarding his alleged tax evasion, for which Mr. Scallio was then charged in severed but pending counts, despite the witness' own protestations and objections. A copy of Mr. Scallio's testimony, in its entirety, is attached hereto as Appendix G.

### C. The Jury Charge

In total disregard to the averments in the Indictment, the trial court sua sponte charged the jury, with regard to the CCE Count (Count I), *inter alia*, as follows:

Before you can find the defendant Samuel Scallio guilty of the crime charges [sic] in Count One of the indictment, you must be convinced beyond a reasonable doubt that the government has proved the following elements:

First: that the defendant Samuel Scallio committed at least one of the violations of the federal narcotics laws specified in Counts II, III and V of the indictment. These counts, as you have heard, charge a conspiracy to violate the federal narcotics laws and specific substantive offenses enumerated in the federal narcotics laws. *Each of the overt acts described in the conspiracy count of the indictment alleges a felony violation of the federal laws.*

Second: If you find that the defendant Samuel Scallio committed at least one of the violations of the federal narcotics laws specified in Count II, III and V of the

indictment, the next element that is the violation must be found to be a part of a continuing series of violations of the federal narcotics laws by the defendant Samuel Scallio.

\* \* \*

In regard to the second element of the offense, the term "series" generally means "three or more" and the term continuing means "enduring" existing for a definite period or intended to cover or apply to successive, similar occurrences.

Thus, you must find beyond a reasonable doubt that the defendant Samuel Scallio committed three or more successive violations of the federal narcotics laws within the period of time set forth in the indictment and with a single or substantially similar purpose. (Emphasis added)

Upon this testimony, and pursuant to the erroneous instructions given them by the judge, the jury returned general verdicts, finding Mr. Scallio guilty of Counts I, II, III, IV and VI, but acquitted him of the December 5, 1984 distribution charge in Count V.

#### D. The Appeal

On appeal, Petitioner urged a reversal of his conviction, *inter alia*, because of the erroneous jury instructions on the CCE charge; the insufficiency of evidence to sustain the CCE conviction; the exclusion of two items of critical impeachment evidence; and the Trial Court's unconstitutional demand that Mr. Scallio answer questions relating to pending tax evasion charges, to which Mr. Scallio had a right to assert his Fifth Amendment privilege.

The Fourth Circuit, by unpublished opinion (see Appendix C hereto), affirmed Mr. Scallio's convictions; finding, *inter alia*, that 1) the CCE count was sufficient as it tracked the statutory language, no more being required; 2) that the Trial

Court's improper reference to Count III and the Overt Acts in its charge to the jury relating to the predicate violations under the CCE charge did not constitute plain error; 3) that the evidence was sufficient to support a jury's finding that Mr. Scallio exercised the requisite supervisory role over, *inter alia*, the Grimes' and Phillips; 4) that, although the Trial Court erred in excluding the two areas of impeachment complained about, that this error was harmless; and 5) that the Trial Court's demand that Mr. Scallio answer questions about his alleged tax evasion, to which he had a valid right to assert his Fifth Amendment privilege, was not error, as "neither he nor his counsel raised an objection."

Upon this Record, and from the Fourth Circuit's affirmance of Mr. Scallio's convictions, we petition this Court for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### I.

IN FAILING TO REVERSE THE CCE CONVICTION BECAUSE OF THE TRIAL COURT'S DOUBLY ERRONEOUS JURY CHARGE, THE FOURTH CIRCUIT VIOLATED THIS COURT'S CONSISTENT PRINCIPLE OF APPELLATE REVIEW FIRST ANNOUNCED IN *STROMBERG v. CALIFORNIA*, 283 U.S. 359 (1931)

The legal errors concerning the CCE charge lodged against Mr. Scallio had their genesis in an Indictment which failed to adequately set forth the requisite elements of the crime.

In order to find an accused guilty of 21 U.S.C. Section 848 (CCE charge), the law requires that the Government prove, beyond a reasonable doubt, *inter alia*, that an accused has committed three or more violations of the federal narcotics laws, in satisfaction of the "continuing series" element contained in the statute. See e.g., *United States v.*

*Amend*, 791 F.2d 1120, 1126 (4th Cir. 1986). *Cf.*, *Garrett v. United States*, 471 U.S. 130 (1985), acknowledging that this factual requirement is imposed by numerous appellate Circuits, and reviewing the conviction therein in light of such prerequisite.

The CCE charge contained in Count I of this Indictment recited but two possible predicate violations, by reference to Counts II and V, rather than the required three. (See Appendix E) A motion challenging the sufficiency of the CCE charge in the Indictment was nevertheless denied.

The Trial Court, having erroneously upheld the Indictment against attack for its alleging but two predicate violations (Count II and V), rather than the required three, thereafter compounded its error by improperly "curing" this deficient Indictment; by broadening the charge and impermissibly amending the explicit, albeit insufficient, averments in the Indictment, in its instructions to the jury (see pp. 13-14, *infra*); and, additionally, erroneously advising the jury that it could rely upon non-Title 21 offenses as predicate violations to support a guilty verdict on the CCE charge, all in violation of Mr. Scallio's Fifth Amendment rights.

In reviewing the insufficient CCE charge laid in this Indictment, and the doubly erroneous jury charge it spawned, the Fourth Circuit failed to apply the time-honored principle of appellate review which this Court has consistently required since its opinion in *Stromberg v. California*, 283 U.S. 359 (1931).

**A. The Fourth Circuit's Review of the Trial Court's Erroneous and Improper Reference to the Overt Acts In Its Charge Relating to the Predicate Violations Element of the CCE Offense Violates the Stromberg Principle of Appellate Review**

In order to be a permissible predicate violation, to meet the "continuing series" of three or more violations element

of a CCE offense, the statute requires that each be an act prohibited by Title 21 U.S.C. Sections 801 through 966. See 21 U.S.C. 848(b)(2), which is set forth in Appendix A hereto.

Thus, it has been held that informing a jury that a non-Title 21 violation can support a CCE conviction is plain error. See *United States v. Webster*, 639 F.2d 174, 181 (4th Cir. 1982), modified on rehearing on other grounds, 669 F.2d 185 (4th Cir. 1982) (informing the "jury that the violations of 18 U.S.C. Section 1952 (a)(3) could support convictions under Section 848" is plain error); see also *United States v. Phillips*, 664 F.2d 971, 1014 (5th Cir. 1982), cert. denied, 457 U.S. 1136 (1983) (conspiracy to commit air piracy, 18 U.S.C. Section 2101(a)(3); obstruction of justice, 18 U.S.C. Section 1503; and interstate or foreign travel in aid of racketeering, 18 U.S.C. Section 1952), even if "integrally related to narcotics enterprise are offenses that could not have been charged against the defendants as underlying violations under Section 848").

The Trial Court's jury charge, read as a whole, unmistakably led the jury to believe that each of the Overt Acts contained in the conspiracy charge (Count II) could satisfy the three or more predicate violations required, even though two of them (Overt Acts 6 and 8) were non-Title 21 offenses, and were charged as such in two substantive Counts in the Indictment (Overt Act 6 was charged in Count VI and reflected activity proscribed by 18 U.S.C. Section 1512; and Overt Act 8 was charged in Count IV and reflected activity proscribed by 18 U.S.C. Section 1952(a)(3)).

As a result of consistent direction by this Court, the Fourth Circuit was required to review this erroneous charge under the principle first announced in *Stromberg v. California*, 283 U.S. 359 (1931); viz., that a "general verdict must be set aside if the jury was instructed that it could rely" on several grounds "and one of those grounds is insufficient, because the verdict may well have rested . . . on the insufficient ground." See also *Zant v. Stephens*, 462 U.S. 862,



882 (1983); *Oklahoma City v. Tuttle*, 471 U.S. 808, 822 and 827 (1985); *Francis v. Franklin*, 471 U.S. 307, 322 & n.8 (1985).

Given the proof adduced at trial, and the jury's ensuing verdicts, the only assurances the appellate court could have had about what evidence the jury found sufficient to represent a violation by Mr. Scallio are their verdicts to the counts in the Indictment. Specifically, the Indictment contained six counts, only three of which reflected Title 21 offenses that were predicate violations upon which they could have legally relied to find Mr. Scallio guilty of the CCE Count; viz., the conspiracy count lodged in Count II, the telephone count lodged in Count III and the distribution count lodged in Count V. The jury acquitted Mr. Scallio of Count V; thus, in reviewing the general verdict herein, the Fourth Circuit had no objective basis by which to find that the jury's verdict of guilty on Count I did not rest upon the erroneous inclusion of non-Title 21 offenses by the trial court's reference to the Overt Acts in Count II.

In utter disregard to the requirement set forth in *Stromberg, supra*, and its progeny (which was recited and argued at length by the Petitioner), the Fourth Circuit affirmed, stating, 1) that it perceived the reference to Overt Acts as only referring to the first element—a finding that the defendant was guilty of a felony violation of the narcotics laws, as charged in the Indictment—and, 2) that other “evidence was produced concerning numerous violations of the controlled substances laws.” Appendix C, p. 9.

The Fourth Circuit's interpretation of this erroneous instruction is not only equally improper (as the first element is also limited to narcotics violations, see 21 U.S.C. Section 848(b)(1)), but, would have required a lay jury to parse out the difference between “federal narcotics laws” and “felony violation of the federal laws,” in the following instruction:

First: That the defendant Samuel Scallio committed at least one of the *violations of the federal narcotics laws* specified in Counts II, III, and V of the indictment. These Counts, as you have heard, charge a conspiracy *to violate the federal narcotics laws* and specific substantive offenses enumerated in the *federal narcotics laws*. Each of the Overt Acts described in the conspiracy Count of the indictment alleges a *felony violation of the federal laws*. (Emphasis added)

And, to thereafter, not interpose the Overt Acts as meeting the requirements in the next paragraph they heard:

Second: If you find that the defendant Samuel Scallio committed at least one of the *violations of the federal narcotics laws* specified in Count II, III and V of the indictment, the next element that is the violation must be found to be a part of a continuing series of *violations of the federal narcotics laws* by the defendant Samuel Scallio. (Emphasis added)

As this Court has held in *Francis v. Franklin*, 471 U.S. 307, 323 n.8 (1985):

Contradictory instructions . . . —one of which imparts to the jury an unconstitutional understanding . . . —create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility. If such a reasonable possibility of an unconstitutional understanding exists, “we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction.” *Sandstrom v. Montana*, 442 U.S. [510] at 526. For this reason, it has been settled law since *Stromberg v. California*, 283 U.S. 359 (1931), that when there exists a reasonable possibility that a jury relied on an unconstitutional understanding of the

law in reaching a guilty verdict, that verdict must be set aside.

No subsequent instruction “explained” the infirm language in this charge relating to the Overt Acts. Indeed, given the temporal proximity of the infirm language, the consistent references to “violations” in the relevant instructions, and the lack of any explanation between “narcotics” violations and “federal” violations, it strains credulity that the jury could have understood this charge in a manner so as to have considered only “narcotics” (Title 21) violations in finding three or more violations to fulfill the “continuing series” element of the offense.

The Fourth Circuit’s second justification for upholding the conviction despite this erroneous charge—i.e., that there had been evidence of “numerous violations of the controlled substances laws” adduced at trial—is similarly unavailing under the *Stromberg* principle. Had the testimony of the Grimes’ herein about other drug transactions been charged in substantive counts in the Indictment, and thus subject to verdicts by the jury, the Fourth Circuit may well have been able to refer to sufficient other violations, found beyond a reasonable doubt, to justify its departure from the *Stromberg* rule. See e.g., *United States v. Webster*, 639 F.2d 174, (4th Cir. 1981), *modified on rehearing*, 669 F.2d 185 (4th Cir. 1982) (finding it plain error to instruct a jury that a violation of 18 U.S.C. Section 1952(a)(3) could support a conviction under Section 848, but finding it harmless, as the jury found the defendant guilty of numerous other narcotics violations beyond a reasonable doubt, all of which were sufficient to fulfill this element of the 848 charge). To claim harmlessness in this case where insufficient other narcotics violations have produced guilty verdicts, however, violates the very basis of the *Stromberg* rule; viz., that, with a general verdict, “[a] reviewing court has no way of knowing which of . . . two irreconcilable instructions the jurors applied in reaching their verdict.” *Francis v. Franklin*, 471 U.S. 307, 322 n.8 (1985).



The Fourth Circuit's reference to other uncharged evidence, therefore, does not square with the due process principles, which are the bedrock upon which the *Stromberg* principle rests. *Francis v. Franklin*, *id.*

**B. The Fourth Circuit's Affirmance In Light of the Trial Court's Unconstitutional Amendment by Adding Count III and the Overt Acts To the CCE Count In Its Jury Charge Similarly Violates the Fifth Amendment**

In its instructions to the jury, the Trial Court also broadened the specific averments of the CCE charge in Count I, in a clear attempt to "cure" its insufficiency, complained about in Mr. Scallio's pre-trial Motion to Dismiss. Specifically, although Count I only referred to Counts II and V as predicates, the Trial Court added to that litany, in charging the jury, Count III: the only other count in the Indictment which reflected a proper predicate narcotics violation for the CCE offense.

This Court has steadfastly taught that where "[t]he court substantially amends the Indictment through its instructions to the jury," it "destroy[s] the defendants substantial right to be tried only on charges presented in the Indictment returned by a grand jury," *Stirone v. United States*, 361 U.S. 212, 217 (1960). Where such an amendment broadens the possible basis for convictions in its instruction, it is reversible error; and, not subject to the harmless error rule. *Cf.*, *United States v. Miller*, 471 U.S. 130, 139-140 (1985) (acknowledging this mandate, but finding it inapplicable to *Miller*, as there the amendment limited, rather than broadened, the bases for conviction).

Both the reference to Count III and the Overt Acts in Count II operated as a broadening amendment to the Indictment's averments in relation to Court I; and, as such, the Fourth Circuit was required to adhere to the

constitutional principles repeatedly intoned by this Court and reverse the conviction.

Because its failure to do so violates the Fifth Amendment, and reflects a departure from the appellate procedures under which it is to operate, we pray this Court issue its Writ of Certiorari.

## II.

### **CERTIORARI SHOULD BE GRANTED, AS THE FOURTH CIRCUIT'S FAILURE TO REVERSE THE CCE CONVICTION REPRESENTS A SUBSTANTIAL AND UNCONSTITUTIONAL DEPARTURE FROM THE LEGAL UNDERPINNINGS OF THIS COURT'S OPINIONS**

In affirming the conviction in *Garrett v. United States*, 471 U.S. 733 (1985), over objection that the CCE offense charged therein was the "same" offense as the underlying predicate violations, this Court engaged in an analysis of the legislative history of 21 U.S.C. Section 848, and found that Congress intended it to be a separate offense, explicitly focussed to reaching only "the 'top brass' in the drug rings, not the lieutenants and foot soldiers." *Id.*, 471 U.S. at \_\_\_\_\_, 105 S.Ct. at 2413. Further, it analyzed the elements of the charge, and determined it to require essential proof of management and supervision of five or more persons, which was not a part of the predicate violations. *Id.*, 471 U.S. at \_\_\_\_\_, 105 S.Ct. at 2415. *See also Jeffers v. United States*, 432 U.S. 137 (1977) (holding, *inter alia*, that a Section 846 conspiracy is a lesser included offense of a CCE charge, "because Section 848 requires proof of every fact necessary to show a violation under Section 846 as well as proof of several additional elements," including that the defendant had exercised supervisory or management control over five or more persons).

In the instant case, Count I (CCE charge) and Count II (the Section 846 conspiracy) rested upon the same evidence and would legally have "merged" as the same offense, unless the essential element of supervisory control by Mr. Scallio over his alleged cohorts could be shown in support of the Section 848 charge.

The proof at trial failed to establish this element; and, as such, the Trial Court erred in failing to grant a judgment of acquittal; and the Fourth Circuit, in conducting its appellate functions, erred in affirming Mr. Scallio's conviction, despite the Government's failure to prove this essential element, thereby sanctioning a conviction in direct conflict to the analytical underpinnings of this Court's opinion in *Garrett, supra*, and *Jeffers, supra*.

Although the Indictment claimed that Mr. Scallio purchased cocaine from suppliers, and used the three members of the Grimes family to courier his money to and cocaine back from these sources, thereafter transferring the cocaine to Phillips, who allegedly ran the distribution portion of Mr. Scallio's network, the proof at trial did not sustain such a scenerio. Instead, the evidence at trial, at best, revealed a buyer-seller relationship between Mr. Scallio and the Grimes family; a relationship which places each participant upon an equal footing in an arms-length transaction. Neither a buyer nor the seller "supervise," "organize," or "manage" the other; and thus, proof of such a relationship fails to fulfill the "supervisory control" element of a Section 848 charge.

Further, the proof at trial failed to establish any distribution by Phillips on the behest of, or aided and abetted by, Mr. Scallio. The only substantive charge claiming such activity between Phillips and Mr. Scallio resulted in an acquittal by the jury at trial.

Faced with such a failure to proof, the evidence at trial was insufficient to support a conviction under the CCE Count, as a matter of law, and on the only essential element here

which distinguished the Section 848 charge from the lesser-included Section 846 conspiracy charge in Count II.

Because the Fourth Circuit, in affirming Mr. Scallio's Section 848 conviction, has thus failed to assure the sufficiency of the essential element necessary to permit convictions on both a Section 846 and Section 848 offense, as this Court has acknowledged in *Jeffers, supra*, and *Garrett, supra*, it has sanctioned an unconstitutional result, and has so far departed from the accepted and usual course of its judicial functions, as to call for the exercise of this Court's power of supervision. For this reason, we pray this Court issue its Writ of Certiorari to review this failure of proof, and its unconstitutional impact upon Mr. Scallio, as well.

### III.

#### **CERTIORARI SHOULD BE GRANTED, AS THE FOURTH CIRCUIT'S FAILURE TO REVERSE IN THE FACE OF THE TRIAL COURT'S ERRONEOUS EXCLUSION OF KEY IMPEACHMENT EVIDENCE CONFLICTS WITH A DECISION OF ANOTHER FEDERAL APPEALS COURT AND VIOLATES THE SIXTH AMENDMENT**

At trial, the District Court excluded two items of critical impeachment evidence in error.

First, it excluded defense witness, John Huber, who was called to testify as to Mrs. Grimes' truthfulness. Although properly offered under Rule 608(a), Federal Rules of Evidence, the Trial Court excluded this testimony as it, inexplicably, felt the rule was only applicable to attacking the credibility of a *defendant*, not a witness.

The Fourth Circuit acknowledged this was error, but found it harmless, by claiming that the case cited for reversal, *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981), could be distinguished. (Appendix C, pp. 12-13).

The Fourth Circuit was simply incorrect that *Davis* was distinguishable—a matter pointed out on rehearing but ignored. Here, Mrs. Grimes was the *only* witness to link Mr. Scallio to certain alleged drug transactions. While her brother-in-law, William, also testified, his testimony related to different alleged transactions, and he offered no corroboration of Mrs. Grimes' involvement at all. Finally, as appellate affirmance of the CCE conviction rested upon just five persons who were involved in establishing the numerosity requirement of the CCE charge (see Appendix C, pp. 5-7), Mrs. Grimes was a critical, indeed necessary, witness to the Government on this charge.

In addition, the cross-examination of Mrs. Grimes (the only impeachment of this critical witness the Trial Court allowed), sought to impeach her credibility with regard to only her prior record and grant of immunity in this case, the same “minimal” impeachment permitted in *United States v. Davis*, 639 F.2d 239, 244 (5th Cir. 1981) (reversal required where two character witnesses, offered for the purpose of discrediting key Government witness, were excluded, no other character witness had been called and “[n]o other impeachment evidence, except for [witness'] own admissions of prior felony convictions and the circumstances surrounding his cooperation with the prosecution was admitted”).

The Fourth Circuit's refusal to reverse because of this error is thus in direct and irreconcilable conflict with *Davis*, *id.*

The second item of impeachment evidence was similarly erroneously excluded and the Fourth Circuit's refusal to reverse as a result thereof is equally in conflict with *Davis*, *supra*.

At trial, Mr. Scallio sought to call Agent Athas, to testify to a statement that Alton (Pete) Grimes—a non-appearing declarant whose inculpatory statements were introduced through his wife, Jacqueline Grimes, and his brother, William Grimes, at trial pursuant to Rule 801(d)(2)(E),



Federal Rules of Evidence—made to him, contradicting the statements of his wife, Mrs. Grimes, and exculpating Mr. Scallio. This impeachment testimony was admissible under Rule 806, Federal Rules of Evidence, and the Trial Court erred in excluding it, as the Fourth Circuit acknowledged. See Appendix C, p. 12. It nevertheless found the error harmless “[a]fter carefully reviewing the entire record and considering the evidence against Scallio. . . .” *Id.* at p. 13

What a “careful review” of the entire record would have shown was that there was simply no other impeachment evidence adduced at trial against this non-appearing witness. As such prior statement would not only have impeached the declarations introduced under Rule 801(d)(2)(E), Federal Rules of Evidence, challenged the veracity of Mrs. Grimes, permitted an admittedly exculpatory (see Appendix C, p.13) and then-existing statement to be heard by the jury, but would have also explained the reason such a critical witness had not been called to testify, the Fourth Circuit’s failure to reverse because of this error is in direct conflict with *Davis, supra*, and represents an egregious breach of Mr. Scallio’s Sixth Amendment rights.

As the Fourth Circuit’s failure to reverse because of each of these two erroneous exclusions of critical impeachment evidence is in conflict with the decision of another federal court of appeals on the same matter, we pray this Court issue its writ of certiorari on this ground as well.

#### IV.

**CERTIORARI OUGHT TO BE GRANTED AS THE FOURTH CIRCUIT’S FAILURE TO REVERSE AS A RESULT OF THE TRIAL COURT’S DEMAND THAT MR. SCALLIO ANSWER QUESTIONS TO WHICH HE COULD ASSERT A VALID FIFTH AMENDMENT PRIVILEGE SANCTIONED A DEPARTURE FROM THE LAW AND CONSTITUTION SO**

## DEVASTATING THAT THIS COURT IS CALLED TO EXERCISE ITS POWER OF SUPERVISION

After answering only two questions put to Mr. Scallio on direct, (see Appendix G., p. 4-5) the Government was permitted to extensively cross-examine Mr. Scallio regarding allegations relating to tax evasion for two previous years (see Appendix G, *passim*, in which Mr. Scallio's entire testimony is set forth), allegations which underlay two pending counts against him, which had been severed prior to trial.

The Fourth Circuit found no error had been committed thereby, claiming that no contemporaneous objection had been made and stating that "Scallio's argument that although neither he nor his counsel raised such an objection, the court had an obligation to interpose a Fifth Amendment objection to inquiries concerning in tax returns is without merit." Appendix C, p. 10.

The record demonstrates, however, that Mr. Scallio did, personally, object to these questions, but was nevertheless instructed that he must answer. See Appendix G, pp 19:

THE WITNESS: Can I ask you something, Your Honor?

THE COURT: What's that.

THE WITNESS: Is this a tax case I am in?

THE COURT: *Mr. Scallio, answer the questions that the U. S. Attorney is propounding. The questions, if they are not proper questions I am certain your counsel or the Court would certainly stop them from asking any questions that are not proper. I don't hesitate to tell the U. S. Attorney they are not proper questions but, these are proper*

*questions under the circumstances of this case and you have to answer them, sir. (Emphasis added)*

The Trial Court's ruling in this regard was simply incorrect. The Government's questions on cross-examination were not within the scope of the brief two-question direct to which Mr. Scallio had been subject, and instead were offered solely as impeachment by an alleged specific instance of conduct relating to his truthfulness. Under Rule 608(b), Federal Rules of Evidence, therefore, Mr. Scallio had an absolute *right* to refuse to answer, based upon his Fifth Amendment privilege (*see* Appendix A, hereto), which said right was, by judicial fiat to this layman, taken from him by the Trial Court's directive to "answer the questions."

While his attorney did fail, inexplicably, to object (and may thereby have provided constitutionally ineffective assistance to him, a matter to be determined in another forum), this cannot legally undercut the fact that an *actual objection was made* (albeit by the defendant himself) and that the Trial Court nevertheless erroneously ruled the questions proper. Furthermore, by this point in the trial, the defense counsel himself may well have felt that the Trial Court had taken over his tasks with relation to advising his clients of their rights and privileges, as the Trial Court had engaged in extensive mid-trial colloquy with both defendants about whether they were going to take the stand or not, sought to advise them of the law governing cross-examination, and had thereby so usurped the role of defense counsel on this crucial and difficult stage of any criminal trial, *see e.g., Brooks v. Tennessee*, 406 U.S. 605, 608 (1972), that to have objected thereto may well have been seen by Mr. Scallio's attorney as a futile act. We have attached hereto as Appendix F, that portion of the trial transcript where this colloquy can be found.



We urge this Court to grant certiorari, as more than sufficient contemporaneous objection was in fact made to these improper questions, and the Fourth Circuit's finding to the contrary is simply incorrect.

Further we urge this Court to grant certiorari, and therein adopt the logic and reasoning of *Poe v. United States*, 233 F.Supp. 173, 177-78 (D.D.C. 1965), *affirmed*, 352 F.2d 639 (D.C.Cir. 1965) (conviction reversed where both trial court and defense counsel failed to apprise the defendant that he could not be cross-examined about a particular matter, when his fear about such cross-examination was determinative of his decision not to testify, thus depriving him of his rights to due process).

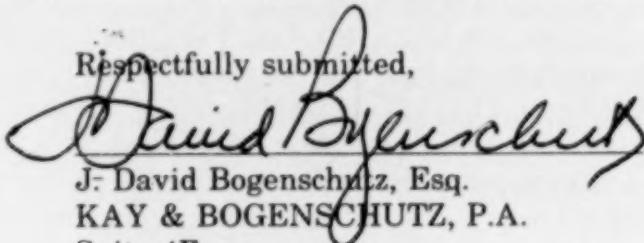
Once the Trial Court undertook to advise Mr. Scallio of his rights, at the very least, the Trial Court had the obligation to recognize Mr. Scallio's objection, once made, and to thereafter determine whether he wished to assert his Fifth Amendment privilege thereto; as, on this Record, there is insufficient basis to conclude that Mr. Scallio knowingly and voluntarily waived this important constitutional privilege. See e.g., *McGautha v. California*, 402 U.S. 183, 215 (1971).

We urge this Court to grant certiorari, as the trial court's demand that Mr. Scallio answer these questions on cross-examination, to which he had an absolute right to assert a valid Fifth Amendment privilege, and the Fourth Circuit's failure to recognize the constitutional dimension thereof, signals a departure from the normal and usual course of judicial proceedings which cannot be countenanced, see *United States v. Atkinson*, 297 U.S. 157, 160 (1936), and which cries out for this Court to exercise its power of supervision.

## CONCLUSION

For all the above and foregoing reasons, we urge this Court to issue its writ of certiorari to the United States Court of Appeals for the Fourth Circuit, to review the matters set forth above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Bogenschutz", is written over the typed name and firm name.

J. David Bogenschutz, Esq.  
KAY & BOGENSCHUTZ, P.A.  
Suite 4F  
633 SE 3rd Avenue  
Fort Lauderdale, FL 33301  
(305) 764-0033

## OF COUNSEL:

LAUREL W. MARC-CHARLES, ESQ.  
Suite 1041  
1001 South Bayshore Drive  
Miami, FL 33131  
(305) 372-8954

# Appendix

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**APPENDIX A**  
**CONSTITUTIONAL AND STATUTORY**  
**PROVISIONS INVOLVED:**

**UNITED STATES CONSTITUTION:**

**Fifth Amendment:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CODE:**

28 U.S.C. Section 848 (prior to 1987 amendment):

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than \$100,000 and to the forfeiture prescribed in section 853 of this title; . . . .

(b) For purposes of subsection (1) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

## FEDERAL RULES OF EVIDENCE:

### RULE 608. Evidence of Character and Conduct of Witness

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.**

\* \* \*

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.



**RULE 611. Mode and Order of Interrogation and Presentation.**

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

**RULE 806. Attacking and Supporting Credibility of Declarant.**

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.



**APPENDIX B**

**[FILED MAY 8, 1986]**

**United States District Court for  
THE DISTRICT OF MARYLAND**

**DOCKET NO HAR-85-0508**

**United States of America**

*vs.*

**SAMUEL SCALLIO, a/k/ SANTO C. SCALLIO  
DFDT. #1 UNKNOWN**

*Defendant*

**JUDGMENT AND PROBATION/COMMITMENT ORDER**

In the presence of the attorney for the government  
William D. Quarles Barbara S. Sale the defendant appeared  
in person on this date May 1, 1986

**COUNSEL**

**WITH COUNSEL James W. Parkman, II, Esq., (Retd.)**

**PLEA**

**(D/O: 1982 to 1984)**

**FINDING & JUDGMENT**

There being a Jury verdict of GUILTY, as to Count Nos.  
1, 2, 3, 4, & 6 of Original Indictment Defendant has been  
convicted as charged of the offense(s) of (Ct. #1)—U.S.C., Title  
21, §848—Continuing Criminal Enterprise; (Ct. #2)—U.S.C.,  
Title 21, §846—Conspiracy to Distribute & Possess w/Intent  
to Distribute a Sch. II NCS: Cocaine; (Ct. #3)—U.S.C., Title  
21, §843(b)—Unlawful Use of a Communication Facility; (Ct.  
#4)—U.S.C., Title 18, §1952 & 2—Interstate Travel in Aid  
of Racketeering; Aiding and Abetting; (Ct. #6)—U.S.C., Title  
18, §1512(a) & Title 18, §2—Obstruction of Justice; Aiding  
and Abetting.

## **SENTENCE OR PROBATION ORDER**

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Thirty-five (35) years and One Hundred Thousand Dollars (\$100,000.00) fine as to Count 1; Count 2, Fifteen (15) years; Count 3, Four (4) years; Count 4, Five (5) years; Count 6, Ten (10) years; Count Nos. 2, 3, 4, and 6 to run consecutive to each other making a total of Thirty-four (34) years to run concurrent with sentence imposed in Count 1; sentence imposed in Count 1 to run concurrent with sentence now serving and a Fifty Dollar (\$50.00) Special Assessment is imposed as to Count Nos. 1, 2, 3, 4, and 6, making a total of Two Hundred and Fifty Dollars (\$250.00) pursuant to Title 18, Section 3013.

## **SPECIAL CONDITIONS OF PROBATION**

UPON A JURY VERDICT OF "NOT GUILTY" AS TO COUNT NO. 5, A JUDGMENT OF ACQUITTAL IS ENTERED BY THE COURT.

## **COMMITMENT RECOMMENDATION**

The court orders commitment to the custody of the Attorney General and recommends It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

## **SIGNED BY**

U.S. District Judges JOHN R. HARGROVE Date May 1, 1986

[Microfilmed date 9 May 1986]

APPENDIX C  
[UNPUBLISHED]  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
No. 86-5587

UNITED STATES OF AMERICA  
*Plaintiff-Appellee*

*v.*

SAMUEL SCALLIO,  
a/k/a Santo C. Scallio  
*Defendant-Appellant*

No. 86-5588

UNITED STATES OF AMERICA  
*Plaintiff-Appellee*

*v.*

PATRICIA LEE SCALLIO  
*Defendant-Appellant*

---

Appeal from the United States District Court for the District  
of Maryland, at Baltimore. John R. Hargrove, District Judge.  
(CR-85-508-HAR)

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Argued: May 4, 1987

Decided: Sept. 9, 1987

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Before WIDENER, PHILLIPS and WILKINS, Circuit Judges.

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Laurel W. Marc-Charles (J. David Bogenschutz; Kay &  
Bogenschutz, P.A. on brief) for Appellants; Barbara  
Slaymaker Sale, Assistant United States Attorney  
(Breckinridge L. Willcox, United States Attorney on brief)  
for Appellee.

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WILKINS, Circuit Judge:

Defendants Samuel Scallio (Scallio) and Patricia Scallio (Mrs. Scallio), husband and wife, appeal convictions arising from cocaine trafficking activities. Scallio was convicted of engaging in a continuing criminal enterprise, 21 U.S.C.A. § 848 (West Supp. 1987); conspiring to possess with intent to distribute and conspiring to distribute cocaine, 21 U.S.C.A. § 846 (West 1981); using a telephone to facilitate the continuing criminal enterprise and the conspiracy, 21 U.S.C.A. § 843(b) (West 1981); traveling in interstate commerce in aid of a racketeering enterprise, 18 U.S.C.A. § 1952(a)(2) (West Supp. 1987); and intimidating a witness, 18 U.S.C.A. § 1512(b) (West Supp. 1987). Mrs. Scallio was convicted of the only charge against her, conspiring to possess with intent to distribute and conspiring to distribute cocaine. 21 U.S.C.A. § 846 (West 1981). We affirm.

I.

Viewed in the light most favorable to the government, the evidence showed that Scallio reaped large profits from transactions involving substantial quantities of cocaine. A search of the Scallios' residence in 1984 produced high sensitivity scales, a freebasing kit, a money counting machine, drug formulas detailing different kinds of "cut" used in diluting drugs, several guns, a vial containing cocaine residue, and a drug transaction ledger.

The drug transaction ledger, as interpreted by an expert for the government, reflected purchases and sales of cocaine beginning May 24, 1982 and continuing through December 1983. The ledger columns showed the quantity purchased, the purchase price, the cost of cutting materials, the number of separate packages in which the cocaine was placed, and the sales price. Several entries also included a hotbox readout indicating the melting point of the cocaine, which rises as the purity of the sample being tested increases.



The ledger detailed 46 purchases totaling 160 pounds of cocaine. From these transactions Scallio grossed \$6,948,400.00, and received a net profit of \$2,478,020.00.

## II.

Scallio attacks his continuing criminal enterprise conviction on several grounds. He first argues that the indictment failed to adequately set forth the elements of the offense in order to fairly apprise him of the charge against him.

In order to successfully establish that a defendant engaged in a continuing criminal enterprise, the government must prove that he (1) committed a felony violation of certain federal controlled substances laws (2) as part of a continuing series of controlled substances violations (3) in concert with five or more persons (4) for whom the defendant was an organizer, supervisor or manager and (5) from which he derived substantial income or resources. 21 U.S.C.A. § 848(d) (West Supp. 1987); *United States v. Lurz*, 666 F.2d 69, 75 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005, 457 U.S. 1136, 459 U.S. 843 (1982). The instant indictment charged that Scallio did:

[V]iolate Title 21, United States Code, Sections 846 and 841(a)(1) as alleged in Counts II and V of this Indictment, which are incorporated herein by reference, which violations are part of a continuing series of violations of Subchapter I of the Comprehensive Drug Abuse Control Act of 1970 . . . undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager, and from which continuing series of violations the defendant obtained substantial income and resources, . . . 21 U.S.C. Section 848.

The indictment adhered to the contours of the statute and plainly set forth the elements of the offense. It has been "consistently held that it is sufficient in a continuing criminal enterprise charge if the indictment tracks the statute." *United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir. 1986), *cert. denied*, 93 L.Ed.2d 353 (1986) (citations omitted). An indictment need not specify the five or more individuals who were managed or supervised, *Amend, id.*, and likewise it need not specify the offenses which will be utilized to establish the second element, the continuing series of controlled substances violations. Additionally, since Scallio's defense was based on his denial of any involvement with drugs, he was not prejudiced by the claimed lack of specificity in the indictment. Consequently, Scallio's attack on the form of the indictment is rejected.

Scallio next contends that the evidence was insufficient to support a finding that he organized, supervised or otherwise managed at least five persons. In addressing this contention, the evidence is viewed in the light most favorable to the government as we decide whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. MacDougall*, 790 F.2d 1135, 1151 (4th Cir. 1986).

The government maintains that the requisite relationship was established with respect to Butch Phillips, Mrs. Scallio, and Pete, Jackie and Billy Grimes. It was not required to show that the relationships existed at the same time, that the five persons acted in concert, or that the same type of relationship existed between the supervisor and each of the five persons. *United States v. Dickey*, 736 F.2d 571, 587 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 459 U.S. 906 (1982).

The government claims Butch Phillips served as Scallio's lieutenant, taking charge of Maryland operations after

Scallio moved to Alabama in 1984. It relies on several telephone conversations between Phillips and Scallio, conversations which Scallio urges were at best coded conversations relating to the general state of the drug business and the whereabouts and legal problems of mutual acquaintances. The government, however, maintains that Phillips was reporting through coded calls on various retail drug outlets and their operators. It also points out that Phillips often referred to Scallio as "Boss," and that he did not use that term in his conversations with other persons. Because the jury could reasonably find the calls were as the government contends, the evidence was sufficient to support the finding that Scallio was an organizer, supervisor or manager of Phillips.

The facts surrounding Mrs. Scallio's involvement with her husband's activities will be addressed when we review her contentions on appeal. They are sufficient to support a finding that she too was organized, supervised or managed by her husband.

Scallio argues that because Pete Grimes generally gave day-to-day instructions to Pete's wife Jackie and his brother Billy, he cannot be considered an organizer, supervisor or manager of Jackie or Billy. However, both Jackie and Billy received money from and delivered cocaine to Scallio. The jury could reasonably find Scallio was an organizer, supervisor or manager of those persons to whom he was giving large sums of cash with which to purchase cocaine. Accordingly, Scallio's contention that the evidence was insufficient to show that he organized, supervised or managed at least five persons is rejected.

Scallio's final attack on the continuing criminal enterprise conviction stems from the district court's charge concerning the first element of the offense, the one predicate felony violation of the federal controlled substances laws. Scallio failed to make any objection in the lower court to the instructions about which he now complains.

In setting forth the first element of the offense, the district court charged that the government must prove beyond a reasonable doubt:

First: That the defendant Samuel Scallio committed at least one of the violations of the federal narcotics laws specified in Counts II, III, and V of the indictment. These counts, as you have heard, charge a conspiracy to violate the federal narcotics laws and specific substantive offenses enumerated in the federal narcotics laws. Each of the overt acts described in the conspiracy count of the indictment alleges a felony violation of the federal laws.

Scallio asserts it was error to charge that Count III or the overt acts could satisfy the first element. While Count III of the indictment does properly set forth a felony violation of the federal controlled substances laws, the continuing criminal enterprises count of the indictment specified only Counts II or V as the predicate felony violation of the federal laws. Scallio also argues that some of the specified overt acts do not involve violations of the federal controlled substances laws and therefore were improperly included in the charge on the first element of the offense.

Due to the absence of an objection at trial, the claim that it was error to charge that Count III or the overt acts could qualify as the predicate felony violation of the federal controlled substances laws is reviewable only if it constituted plain error. Fed. R. Crim. P. 52(b). To establish that there was plain error, it must be shown that the claimed error "seriously affected 'substantial rights,' [and] that it had an unfair prejudicial impact on the jury's deliberations." *United States v. Young*, 470 U.S. 1, 16-17 n.14 (1985). Here Scallio was convicted on Count II, the conspiracy count. This conviction satisfied the predicate felony violation element of the offense. Thus, Scallio suffered no unfair prejudicial impact

from the error. Consequently, the error did not rise to the level of plain error.

Scallio also argues that the charge characterizing the overt acts as felony violations tainted the charge on the second element of the offense, allowing the jury to consider non-narcotic offenses as part of the continuing series of controlled substances violations. However, the district court properly charged the jury on the second element of the offense:

Second: If you find that the defendant Samuel Scallio committed at least one of the violations of the federal narcotics laws specified in Count II, III and V of the indictment, the next element that is the violation must be found to be a part of a continuing series of violations of the federal narcotics laws by the defendant Samuel Scallio.

. . . .

In regard to the second element of the offense, the term "series" generally means "three or more" and the term continuing means "enduring" existing for a definite period or intended to cover or apply to successive, similar occurrences.

Thus, you must find beyond a reasonable doubt that the defendant Samuel Scallio committed three or more successive violations of the federal narcotics laws within the period of time set forth in the indictment and with a single or substantially similar purpose.

The mischaracterization of the overt acts in the charge on the first element of the offense cannot be incorporated into the charge concerning the second element and then labeled "plain error." The second element was charged correctly. Moreover, evidence was produced concerning numerous violations of the controlled substances laws, and the jury

clearly rejected Scallio's all-or-nothing defense that he was an extremely successful used car dealer, not a drug dealer.

### III.

Both Scallio and his wife contend the district court usurped defense counsel's role by advising them concerning their fifth amendment rights. Mrs. Scallio, who did not testify, also asserts that the scope of cross-examination and the spousal privilege were not adequately explained to her by the court. Scallio additionally claims his fifth amendment rights were violated when he was questioned concerning his tax returns.

These three matters were not brought to the attention of the district court. Moreover, defense counsel expressly requested the court to advise his clients concerning their fifth amendment rights. It was not error for the court to fulfill this request. If counsel believed his clients needed additional information, he could have provided it himself or requested further assistance from the court. No plain error was committed by the district court in failing to *sua sponte* provide more information. Scallio's argument that although neither he nor his counsel raised such an objection, the court had an obligation to interpose a fifth amendment objection to inquiries concerning his tax returns is without merit.

### IV.

Mrs. Scallio contends the evidence was insufficient to support her conviction on the conspiracy count, the only count in which she was named. She also asserts her motion for a severance was erroneously denied, and her tax returns were improperly admitted during rebuttal.

Mrs. Scallio claims the evidence failed to show she had any knowledge of the illegal dealings of her husband. However, the evidence, viewed in the light most favorable to the government, soundly defeats this argument. The evidence showed she purchased materials with money orders in her name from the "High Ole Times" Company, which



sold products suitable for diluting cocaine. The evidence also showed that as she and her husband were preparing to move from Maryland to Alabama in 1984, she told Jackie Grimes the move was attributable to too much "heat" in Maryland. Upon arriving in Alabama, Mrs. Scallio purchased a \$300,000.00 home in her name with cash. All other substantial assets of the couple were also titled in her name.

Furthermore, in December 1984, when Scallio flew to Maryland, the ticket was purchased with cash in the name of Michael Higdon, Mrs. Scallio's brother. Following questioning of Higdon by the authorities, he called Mrs. Scallio and inquired about the ticket. She told him that it was to have been a Christmas gift for him that he never received.

Finally, when the Scallios' home was searched, Mrs. Scallio's purse contained a loaded handgun and a slip of paper with the name, address and physical description of Nick Dezes and a list of automobiles he drove. Although Scallio had not personally engaged in any transactions with Dezes, it was Dezes' cooperation with authorities which triggered the chain of events leading to the apprehension of the Scallios. Thus, Scallio had a motive for revenge against Dezes, and it is relevant that Mrs. Scallio had custody of the information necessary to locate and identify him.

Consequently, the evidence concerning Mrs. Scallio extended beyond the portrayal of a spouse who was merely present and innocently enjoyed the fruits of her husband's crime. The government's case was amply sufficient to support her conviction on the conspiracy charge.

Further there was no abuse of discretion in the denial of her motion for severance. While her counsel argued below that in testifying she would exculpate herself but incriminate her husband, there was no proffer of what her testimony would be. Absent such a showing, the district court did not abuse its discretion in denying the motion.

There was also no abuse of discretion in admitting Mrs. Scallio's tax returns on rebuttal. At a minimum, the returns were relevant to show no substantial profits arising from the sale of any of the assets titled in her name. Moreover, she has shown no prejudice from the introduction of the tax returns.

## V.

Finally, the Scallios assert that the district court improperly excluded testimony from John Huber and government agent Athas. While the testimony should have been allowed, the error was harmless.

The defense called Mr. Huber to testify that Jackie Grimes, one of the key government witnesses, had a poor reputation for truthfulness. The district court declined to allow the witness to testify, holding Federal Rule of Evidence 608 permitted such testimony as to the reputation for truthfulness only of a defendant, not a witness. The district court erred because the application of Rule 608 is not limited to defendants. The Scallios, relying on *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981), claim reversal is mandated. However, *Davis* is distinguishable from this case. In *Davis* there was only one key witness and he was subject to minimal impeachment. In the instant case, Jackie Grimes was not the only witness linking Scallio to drug transactions. Moreover, her credibility was extensively challenged by reference to her prior record and other matters. Consequently, the exclusion of opinion testimony concerning her reputation for truthfulness was harmless.

The exclusion of certain testimony from Agent Athas was also harmless error. At best his testimony would have shown that Pete Grimes at one time made an exculpatory statement concerning Scallio. After carefully reviewing the entire record and considering the evidence against Scallio, the exclusion of this testimony does not warrant reversal.

**AFFIRMED.**

APPENDIX D

[FILED DEC 8 1987]

U.S. Court of Appeals Fourth Circuit  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

Nos. 86-5587  
86-5588

United States of America

*Plaintiff-Appellee*

*versus*

Samuel Scallio, etc., et al

*Defendant—Appellant*

On Petition for Rehearing with  
Suggestion for Rehearing In Banc.

ORDER

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted in this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Widener and Judge Phillips.

For the Court,

JOHN M. GREACEN

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CLERK



**APPENDIX E**  
**[FILED OCT 2 1985]**

WDQ:BSS:cl

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**CRIMINAL NO. 85-0668**

(Continuing Criminal Enterprise, 21 U.S.C. Section 848;  
Conspiracy to Distribute Narcotics, 21 U.S.C. Section  
846; Distribution of Cocaine, 21 U.S.C. Section 841;  
Unlawful Use of Telephone, 21 U.S.C. Section 843;  
Interstate Travel in aid of Racketeering, 18 U.S.C.  
Section 1952; Obstruction of Justice, 18 U.S.C. Section  
1512; Aiding and Abetting, 18 U.S.C. Section 2)

**UNITED STATES OF AMERICA**

*v.*

**SAMUEL SCALLIO,  
a/k/a Santo C. Scallio  
and PATRICIA LEE SCALLIO**

**INDICTMENT**

The Grand Jury for the District of Maryland charges:

From a time unknown but beginning prior to 1982, and  
continuing thereafter up to and including December 6, 1984,  
in the State and District of Maryland, and elsewhere

SAMUEL SCALLIO, a/k/a Santo C. Scallio the defendant  
herein, did violate Title 21, United States Code, Sections 846  
and 841(a)(1) as alleged in Counts II and V of this Indictment,  
which are incorporated herein by reference, which violations  
are part of a continuing series of violations of Subchapter  
I of the Comprehensive Drug Abuse Control Act of 1970 (Pub.  
L. 91:513 Title II, Section 101 *et seq.*, October 27, 1970, 84  
Stat. 1242, 21 U.S.C. 801 *et seq.*) undertaken by the defendant  
in concert with at least five other persons with respect to

whom the defendant occupied a position of organizer, supervisor and manager, and from which continuing series of violations the defendant obtained substantial income and resources, thereby making the profits obtained by him in such continuing criminal enterprise, and any of his interest in, claims against, or property or contractual rights of any kind affording a source of influence over, such enterprise subject to forfeiture to the United States of America.

21 U.S.C. Section 848

## COUNT II

And the Grand Jury for the District of Maryland further charges:

1. From a time unknown but beginning prior to 1982, and continuing thereafter up to and including December 6, 1984, in the State and District of Maryland and elsewhere,

SAMUEL SCALLIO, a/k/a Santo C. Scallio

and

PATRICIA LEE SCALLIO

the defendants herein, did willfully, knowingly and unlawfully combine, conspire, confederate and agree together, with each other, and with diverse other persons whose names are to the Grand Jury known and unknown, knowingly and intentionally to distribute, and knowingly and intentionally to possess with intent to distribute, a Schedule II Narcotic Controlled Substance, to wit: Cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was a part of the conspiracy that SAMUEL SCALLIO, a/k/a Santo C. Scallio, would and did direct the operations of the other conspirators.

3. It was further a part of the conspiracy that SAMUEL SCALLIO, a/k/a Santo C. Scallio, would purchase large quantities of cocaine from diverse sources, including but not



limited to DAVID BRUCE REIMSNIDER and NICHOLAS DEZES.

4. It was further a part of the conspiracy that SAMUEL SCALLIO, a/k/a Santo C. Scallio, would pay other members of the conspiracy, including but not limited to ALTON DEWITT GRIMES and WILLIAM DANIEL GRIMES, to transport cocaine and cash for him.

5. It was further a part of the conspiracy that SAMUEL SCALLIO, a/k/a Santo C. Scallio, and PATRICIA LEE SCALLIO would purchase substances with which to adulterate and dilute cocaine, substances commonly known as "cut."

6. It was further a part of the conspiracy that SAMUEL SCALLIO, a/k/a Santo C. Scallio, would distribute large quantities of cocaine to other co-conspirators in the central Maryland area, including but not limited to EDWARD ALLEN PHILLIPS, a/k/a "Butch", CHARLES EUGENE PERRY, SR., and MICHAEL JEROME SWIDOWICH.

7. It was further a part of the conspiracy that SAMUEL SCALLIO, a/k/a Santo C. Scallio, kept records noting the amount and purity of the cocaine he handled, together with his net cost and the profit he realized from the distribution.

### OVERT ACTS

During the course of and in furtherance of the aforesaid conspiracy, the defendants and their co-conspirators committed the following overt acts in the State and District of Maryland and elsewhere:

1. On or about March 27, 1983, SAMUEL SCALLIO, a/k/a Santo C. Scallio arranged to purchase a quantity of cocaine.

2. On or about March 27, 1983, ALTON DEWITT GRIMES, at the behest of SAMUEL SCALLIO, a/k/a Santo C. Scallio, arranged to purchase a quantity of cocaine from DAVID BRUCE REIMSNIDER.

3. On or about March 27, 1983, SAMUEL SCALLIO, a/k/a Santo C. Scallio, gave currency in an amount exceeding \$100,000 to ALTON DEWITT GRIMES and JACQUELINE GRIMES for the purchase of cocaine.

4. On or about December 15, 1983, CHARLES EUGENE PERRY, SR. possessed a quantity of cocaine.

5. On or about December 22, 1983, MICHAEL JEROME SWIDOWICH possessed a quantity of cocaine.

6. In or around April 1984, SAMUEL SCALLIO, a/k/a Santo C. Scallio, had a conversation with co-conspirator CHARLES EUGENE PERRY, JR.

7. On or about December 4, 1984, SAMUEL SCALLIO, a/k/a Santo C. Scallio, telephoned EDWARD ALLEN PHILLIPS, a/k/a "Butch".

8. On or about December 5, 1984, SAMUEL SCALLIO, a/k/a Santo C. Scallio, travelled to Maryland to meet with EDWARD ALLEN PHILLIPS, a/k/a "Butch".

21 U.S.C. Section 846

### COUNT III

The Grand Jury for the District of Maryland further charges:

1. Counts I and II of this Indictment are realleged and incorporated herein by reference as if set out fully herein.

2. On or about December 4, 1984, in the State and District of Maryland and elsewhere,

SAMUEL SCALLIO, a/k/a Santo C. Scallio

knowingly and intentionally did use a communication facility, that is, a telephone, in committing, causing and facilitating the continuing criminal enterprise charged in Count I and the conspiracy to distribute and to possess with intent to distribute cocaine charged in Count II, acts

constituting felonies under Title 21 United States Code Sections 841(a), 846 and 848.

21 U.S.C. Section 843(b)

#### COUNT IV

And the Grand Jury for the District of Maryland further charges:

On or about December 5, 1984, in the State and District of Maryland and elsewhere,

SAMUEL SCALLIO, a/k/a Santo C. Scallio

knowingly did unlawfully travel in interstate commerce from the State of Alabama to the State and District of Maryland with the intent to promote, manage, establish and carry on, and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, said activity being a business enterprise involving the distribution and possession with intent to distribute a Schedule II Narcotic Controlled Substance, to wit: Cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and involving a conspiracy to distribute and possession with intent to distribute a Schedule II Narcotic Controlled Substance, to wit: Cocaine, in violation of Title 21, United States Code, Section 846, and thereafter, the defendant, SAMUEL SCALLIO, a/k/a Santo C. Scallio, did perform and attempt to perform acts to promote, manage, establish, and carry on and to facilitate the promotion, management, establishment, and carrying on of the said unlawful activity.

18 U.S.C. Section 1952(a)(3)

18 U.S.C. Section 2

#### COUNT V

And the Grand Jury for the District of Maryland further charges:

On or about December 5, 1984, in the State and District of Maryland,

**SAMUEL SCALLIO, a/k/a Santo C. Scallio**  
did knowingly and intentionally distribute a quantity of a  
Schedule II Narcotic Controlled Substance, to wit: Cocaine.

21 U.S.C. Section 841(a)(1)

18 U.S.C. Section 2

### **COUNT VI**

And the Grand Jury for the District of Maryland further  
charges:

In or about April 1984, in the State and District of  
Maryland,

**SAMUEL SCALLIO, a/k/a Santo C. Scallio**  
did knowingly, willfully and intentionally use intimidation  
against Charles Eugene Perry, Jr. and did threaten Charles  
Eugene Perry, Jr. with intent to hinder, delay and prevent  
the communication to law enforcement officers and judges  
of the United States information relating to the commission  
of federal offenses, to wit: the illegal distribution of cocaine  
by **SAMUEL SCALLIO, a/k/a Santo C. Scallio.**

18 U.S.C. Section 1512(a)

18 U.S.C. Section 2

/s/ Catherine C. Blake  
**CATHERINE C. BLAKE**  
United States Attorney

**A TRUE BILL:**

/s/ [illegible]

**FOREPERSON**

## APPENDIX F

[1118] MR. QUARLES: Thank you.

THE COURT: As to all six counts. All right.

Now do you want to advise your client now or later?

MR. PARKMAN: We can do it now, Your Honor.

THE COURT: All right.

MR. PARKMAN: Could I ask the Court to do that?

THE COURT: I will be happy to do that.

MR. PARKMAN: I would appreciate it, Your Honor.

THE COURT: If you will ask them to stand up I will be happy to do it. Both Mr and Mrs. Scallio. All right.

Now I want each of you to listen to me very carefully. You know under the law you do not have, as I think I am sure your counsel has told you, you do not have to, in addition, offer any evidence if you don't want to. You do not have to take the stand and testify in your behalf unless you so desire, as to each and every one of you, you understand that. That is a personal choice that you have to make. Your attorney cannot make that choice for you. He can only advise you. He can tell you, he can't make you take the stand if you don't want to. He can't keep you off if you don't want to stay off. And so this is something that you and you alone will have to make a choice.

Now if you decide not to take the stand, either one of you, then you would be entitled at the end of the case to an instruction to the jury that the fact that you did not take [1119] the stand that they could draw no inference of guilt from that fact. In other words, they could not say simply because you did not take the stand that you are guilty. They would have to then decide the case, your guilt or innocence, on all the evidence presented, and could not consider the fact that you did not take the stand.

Now if you do take the stand to testify, then you would open yourself up to cross-examination by the government who could then inquire into any past criminal violations that are relevant under the law, they could do that. They could ask you any questions that are relevant to the case, as it exists. The Court could ask any questions as well, because the Court always has a right to ask questions in these cases to clear up the evidence and that sort of thing.

Do each of you understand that you do have that right not to take the stand?

MRS. SCALLIO: Yes.

MR. SCALLIO: I understand.

THE COURT: You also understand you have a right to take it if you want to?

MR. SCALLIO: Yes, sir. I don't understand what you mean buy it opposite up other areas of things.

THE COURT: Well, if you take the stand, for example, if you had a prior conviction in narcotics, within a relatively, I mean within not too far away, then they can [1120] inquire as to that conviction.

MR. SCALLIO: They could just ask me what I was convicted for previously.

THE COURT: It might be a little more than that. You don't necessarily have to be convicted. But if they could establish, they could ask you some other questions. If they could establish by some other evidence your involvement, and it could be established, that you are involved in a similar activity, even though without a conviction, they could inquire into that. Because once you take the stand you give them the opportunity just like your attorney could ask questions of all the government's witness to very extensive, they could ask you some very extensive questions, so it might or might not be limited. So it has to be relevant and it has to be something closely akin to what we are dealing with here.



MR. SCALLIO: It can't be a matter completely different from the matter we are discussing.

THE COURT: It can't be you didn't pay your telephone bill one month and were sued by the telephone company, right. It has to be related to something, or in other words moral turpitude.

Now it doesn't necessarily have to be about drugs either. It could be some crime in which, for example, where honesty is involved for example. It could be larceny or where truthfulness is involved, always perjury. Or it could be in [1121] that area. Or a crime of a very serious nature which shows, I mean all of this, all of this they could probably inquire into, but what would happen and I think we would do it if that happened the Court would first, and as I always do, I would first require the government to preliminary tell the Court which areas they are going into and that is under 404 (b), and that is a proper way to do it, and then your counsel and the government, the Court would then decide which ones are the proper ones and which ones are not. I mean sometimes a simple assault is not necessary to get involved, but it depends on what it is.

All I am telling you is that I don't know anything about his background, that you open the door for the government to ask you questions in that area. Of course they could ask you questions, either one of you, if you decide to take the stand any question as it relates to the area which we are dealing with here. And you heard all of the government's case so far. They could ask you questions about any area, any person, and this is all that they could ask you.

MR. SCALLIO: Excuse me, Your Honor.

THE COURT: Yes, sir. Go right ahead.

(There was a pause in the proceedings.)

THE COURT: I think Mr. Parkman has asked me to tell you this and I am going through it in some detail because

I want to make it very clear if you decide to take the stand [1122] that you might be extensively examined in areas which cover anything you have said so far in this case, and the person who is just talked about. Anything that has come in you can be asked about it, if you understand that. Any evidence that has come in as it relates you can be asked about. There is no limit really as far as the evidence in this particular case that has already been admitted. You understand that both of you?

MRS. SCALLIO: Yes, sir.

MR. SCALLIO: Yes.

THE COURT: That is what cross-examination is all about. Mr. Parkman, he was given the opportunity to cross examine on every bit of evidence that came in, that is your right, and that's what he did. And the government has the same right and they can do the same thing for any evidence presented. You are going to present your evidence, they have a right to cross examine you on that, if you take the stand.

Now understanding all of that, they also I should advise you, they will also, if necessary, the government since they have the burden of proof will have an opportunity after, if they feel that they have some other evidence to rebut anything you might say if you take the stand, they could produce that evidence and they could produce it even if your counsel has not seen or heard of it because in rebuttal evidence you never know what a defendant might say or a [1123] witness for the defendant might say.

So those are the things. I am probably going into more detail than you normally would but I under the importance of this case to both of you. I think you should know the full consequences so you can make an intelligent choice as to whether you do or do not want to take the stand. Now if you want to talk to Mr. Parkman while we are at lunch I will be perfectly happy to let you do that, because I have said an awful lot and you may have some questions of him. I think

there is no hurry. They can make their decision with what I have said in mind. I think I have been pretty inclusive.

MR. PARKMAN: One other thing, Your Honor, just so they will know. It is kind of like a question to you. This, that you have just told them, is just standard procedure in every criminal case with the Court, is it not, sir, with regards to telling defendants this?

THE COURT: No. This is above and beyond what I usually tell only because you asked me, and I thought I would tell them in some detail.

MR. PARKMAN: Yes, sir.

THE COURT: Normally, I wouldn't go into all this great detail, merely tell them that they have a right to take the stand and are subject to cross-examination, everybody knows what's cross-examination. But in this case it is a very important case for them. We dealt with a lot of evidence. We [1124] have a lot of charges. I thought I should tell them how far, to what extent they can be examined. I don't know how far you can go. It depends on what they say if they take the stand. As you well know you are only limited as far as the evidence.

MR. PARKMAN: What I am trying to say so they won't think that you are just singling them out by this, this is done by the Court, it may not be done as extensively as you have done it but all defendants in criminal cases in your court are advised about this somehow.

THE COURT: Absolutely. The law requires it. The law requires that you be either advised by the Court, if the lawyer doesn't do it the Court is going to do it. No, this is a requirement that you be notified before you take the stand out of the presence of the jury, that you have these rights. Because later on if the defendant is convicted he can come back and say I didn't know, my lawyer didn't tell me I didn't have to take the stand. The record is clear that somebody has advised you. The law requires that I do it. This is not

unusual. This happens in every criminal case that we have. We advise the defendant, either the attorney or the Court, advises the defendant of their rights to remain silent, or the right to take the stand. Actually, it is your right to remain silent.

MR. PARKMAN: Thank you. I just wanted them to know it wasn't something that was special.

[1125] THE COURT: No, no, this I would do in every case.

MR. PARKMAN: Thank you, sir.

THE COURT: I excused the jury to 2:00 o'clock. You can talk to Mr. Parkman and he can explain if you have any questions.

(Luncheon recess taken.) —

APPENDIX G

[1228]

[FILED JUN 30 1986]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

Volume No. 9

FCCA: 86-5587

86-5588

Criminal No. HAR-85-0508

UNITED STATES OF AMERICA

*vs*

Samuel Scallio a/k/a Santo C. Scallio  
and Patricia Lee Scallio

Baltimore, Maryland  
March 17, 1986

BEFORE: His Honor, John R. Hargrove and a jury.

APPEARANCES

For the U.S.A.:

Barbara S. Sale

and

William D. Quarles

For the Defendants:

James W. Parkman, III

Vol. XIII

\* \* \*

[1235] THE COURT: Yes.

MR. PARKMAN: Mr. Scallio indicated to me as of  
yesterday he was going to testify.

THE COURT: What about Mrs. Scallio?

MR. PARKMAN: For the record, Mrs. Scallio was not going to testify. If she was in a trial separately she would testify on her own behalf but due to the complicated issue of the charges and the nature of the charges.

THE COURT: That is nice but is she going to testify?

MR. PARKMAN: She is not going to testify today.

THE COURT: For whatever reason she is not going to testify. I mean the fact that she might be in a trial by herself, you know many people have reasons for testifying and not testifying.

MR. PARKMAN: Yes, sir, that is right.

THE COURT: I only want them to put that on the record for a lot of reasons. I think you certainly would want them to put that on the record for obvious reasons.

MR. PARKMAN: Absolutely.

THE COURT: You never know what is going to happen.

Do you have any evidence you want to present after those?

MR. PARKMAN: I have one short witness by the name of D.C. Jones. He was a listener of one of the telephone conversations that was being monitored and he heard where  
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[1240] tonight.

THE COURT: With the rest of this we would be here pretty late. I think it would be unfair to send it out to the jury after two or three weeks to force them to deliberate. Okay.

(The following proceedings were had in open Court in the presence and hearing of the jury:)

THE COURT: All right. You have to stand up and state it for the record, both of you please.



MR. PARKMAN: Your Honor, I will start it off if I could and then I will ask them if they have anything they would like to add or say.

THE COURT: Both of you understand, I went through some questions earlier in the week, the last week, I believe, as to whether or not, or mid-week, I believe, as to whether or not you desired to testify or not to testify, do you recall that? And I think both of you indicated that you would wait until sometime during the course of the defense to notify the Court whether you will or will not. Now have you made up your minds?

MR. SCALLIO: Yes, I did.

THE COURT: What are you going to do, Mr. Scallio.

MR. SCALLIO: I am going to testify.

THE COURT: How about you, Mrs. Scallio?

MRS. SCALLIO: I have made up my mind.

[1241] THE COURT: Yes.

MRS. SCALLIO: And I am not going to testify.

THE COURT: You can bring the jury in and call whatever witnesses you want Mr. park.

MR. QUARLES: Your Honor, I hate to belabor this, but is there someway where perhaps Mrs. Scallio could again affirm that her decision is not at all influenced by the fact that they have joint counsel.

THE COURT: No, I think I adequately advised her. The fact that she has counsel and counsel can give her advice. I suppose she accepts that advice whether it be for trial strategy or whatever purpose it is.

It is your choice, is it not, Mrs. Scallio? This is your individual choice? You recall I said this is something you had to do whether your attorney advised you or not, if you

disagree with him, you can disagree with him on this, do you understand that?

MRS. SCALLIO: May I just tell you why?

THE COURT: Yes.

MRS. SCALLIO: I decided on my own not to testify. It has nothing to do with my counsel. It has to do with our trials, the trial being together.

THE COURT: All right. Whatever reason it is that is all right.

MR. PARKMAN: Thank you, Your Honor.

[1242] You can call the jury.

(The following proceedings were had in open Court in the presence and hearing of the jury:)

THE COURT: Good morning. Ready to proceed?

MR. PARKMAN: Yes, sir, Your Honor. At this time the defense would call to the stand the defendant Samuel Scallio.

SAMUEL SCALLIO, a defendant, sworn.

#### DIRECT EXAMINATION

BY MR. PARKMAN:

THE CLERK: state your name for the record please?

THE WITNESS: Samuel Scallio.

Q Mr. Scallio, I would like to begin by asking you are you one of the defendants on trial with regards to this case?

A Yes, sir.

Q Mr. Scallio, for the last numerous days I believe you have been sitting here and you have been hearing the testimony and the evidence that's been presented against you. What I would like to do, please, sir, I would like to ask you if you have ever prior to today, ever been involved in the cocaine or drug business either as a purchaser, or a seller, or a financier?

A No, sir, I have not.

MR. PARKMAN: Mr. Scallio, would you please answer the questions, all of the questions that the government may have of you. Thank you.

THE WITNESS: Yes, sir.

[1243] CROSS EXAMINATION

BY MS. SALE:

Q Mr. Scallio, as I understand it from matters raised by your attorney in questioning other witnesses in this case, you claim to have been involved in the car business for most of your life, is that accurate?

A Yes, ma'am.

Q When did you first get into the car business?

A In the very very early 1960's.

Q And have you been involved in the car business more or less steadily through until when?

A Up until 1983. And also I have some other business.

THE COURT: Can you sort of pull the microphone up.

Q Let me just ask you to review some of the people whose names that have come up during the course of this trial, you know Butch Phillips?

A Yes, ma'am.

Q And how do you know Butch?

A I have known him through his brother, who had a junk yard, a junk yard in Maryland.

Q His brother is Buck-Eye Phillips?

A His brother is Buck-Eye Phillips, and I have sold him many many cars. Many cars.

Q When did Buck die?

A I think in 1983.

[1244] Q You attended his funeral, correct?

A Yes, ma'am, I did.

Q And what is Butch's girl friend's name?

A Jody.

Q And who is Annette Phillips?

A Annette Phillips is Buck-Eye Phillips's, his wife.

Q And you bought Dino's from Annette Phillips, is that correct?

A That is correct.

Q Actually it was Patty?

A Yes. I just don't want to get caught in your questions there. So you made it clear Patty did buy it.

Q Let me just see if this is correct: Patty was the owner of Dino's is that correct?

A Yes, ma'am.

Q How long did you own Dino's?

A I would roughly say somewhere between one and one and half years, somewhere in there, I am really not sure.

Q When did Patty purchase Dino's from Annette Phillips?

A I can't tell you the exact day or the exact month.

Q Would Dino's records reflect that?

A I think you have all those records. I am almost sure you have looked at them.

Q But they would reflect that?

A Yes, ma'am.

[1245] Q When did you sell Dino's?

A It was in 1984 I think.

Q June, would that be about right?

A If I would tell you June I wouldn't be telling you the truth. I cannot remember the month.

Q Now Patty, your wife, was also the owner of American Auto Sales, is that correct?

A Yes, ma'am, but not original American Auto Sales. I was and I was a licensed dealer and I had a license.

Q NOW American Auto Sales is a trade name, is that correct?

A Yes, ma'am.

Q What was the other name for that business?

A What year?

Q Let's stick with the '80's, Mr. Scallio, 1980, '81, '82?

A It always was American Auto Sales.

Q What is National Auto Appraisals?

A National Auto Appraisals was a separate thing that I did on the side appraising automobiles for other people.

Q They were both listed on the same checks, is that correct?

A Yes, ma'am.

Q You ran them out of the same office?

A I appraised automobiles for new car dealers, and used car dealers, and insurance companies and independents to get values on their vehicles whenever they had a wreck, any purpose at all.

[1246] Q But this was one of Patty's businesses in the '80's, is that correct?

A No, it was mine. I was that. I was National Auto Appraisals. That's what I did.

Q And she was American?

A American Auto Sales.

Q And you ran them both out of the same checking account though, is that correct?

A I don't know whether it was a separate account or a dual account. I am not sure.

Q The checks would reflect that?

A Yes, ma'am. You would have them.

Q And you ran them both out of the same property at 502?

A 502 and 504.

Q Crain Highway?

A Crain Highway.

Q Adjoining lots?

A Yes, ma'am, plus separate. Joint but separate.

Q One trailer?

A One trailer it was and one garage that I built in the early 60's.

Q And, in fact, you leased property at 502 Crain Highway to Reliable, is that correct?

A Yes, ma'am, I did. That was leased to them and another unit was brought in and attached to that one and it made two [1247] separate like buildings attached with a roof.

Q Reliable was the business operated by Pete and Jackie Grimes, is that correct?

A Yes, ma'am.

Q Now who is Annette Phillips?

A I told you before Annette Phillips was Buck's wife.

Q Who is Tony Phillips?

A That would have been the son of Annette and Buck.

Q And Pete and Jackie were your tenants at 502 Crain Highway, is that correct?



A Yes, ma'am.

Q Who is Mike Swidowich?

A He is a person who years ago was in the automobile business that I sold cars to and he had a garage and filling station on, I can't think of the name of that road. In Glen Bernie anyway. He used to service our cars for us.

Q Did you rent him the property that he had his business on?

A Back then in the 60's?

Q At any time?

A No, ma'am.

Q Did you sell him your house?

A Yes, ma'am, I did.

Q When did you sell him your house?

A Was it 1982?

Q That was the house at 506 Elizabeth Road, is that correct?

[1248] A Yes.

Q In fact, actually that house you sold to Shirley Ann Swidowich who is the wife, is that correct?

A I don't remember really who was on the deed. I wasn't. I wasn't in the attorney's office I don't think when it took place.

Q You heard some mention of the Scott's, the Scott family, do you know them?

A The Scott family?

Q Yes, sir?

A First name?

Q George?

A I know George.

Q How do you know George?

A I think is a cousin of Phillips.

Q Excuse me I didn't hear you?

A He is a cousin I believe of the Phillips family.

Q Did you meet George through Butch Phillips?

A Yes. He had opened a body shop and almost every dealer in Glen Bernie met him because he came round dealer to dealer to try to get work to paint cars.

Q Let's make sure we are clear on this, is this George Scott Senior or George Scott, Junior, do you know?

A Oh, the father used to have a gas station in Morrell Park, if that's the one you are talking about. Which one are you [1249] talking about?

Q You know them both then?

A Yes, ma'am. I know the father.

Q The father is the cousin to Butch Phillips?

A No, the father I don't think could be a cousin. He is not no blood relation. I think his wife is the blood relation.

Q Who is Sam Pannuty?

A Sam Pannuty owns a very large junk yard and it is on Mt. Road in Passadena, Maryland, and he also has a used car lot and he also rented his used car lot to Jackie and Pete Grimes for years but sold it and that's why they rented our lot.

Q Who is Nick Dezes?

A I have no idea, until the day that you brought him in here.

Q You had never heard the name before?

A No. Not that I can recall or any real conversation.

Q What about the name David Bruce Reimsnider?

A None other than what I have heard from this trial.

Q Other than this trial completely unfamiliar to you?

A Wait a minute. What do you mean by Nick Dezes? Make it clear to me. The guy that was sitting in here?

Q Yes, sir. The second witness I think in the trial, the one that had the drug records?

A Oh, okay, yeah. We had an encounter with him. Either Jackie, and it has been a good while back, or Pete, or said [1250] that this man came on the lot, and we had a back office, and he had either tried to sell him stolen cars or a couple of cars. I couldn't quite get it straight. And Jackie had somehow or another give, Mrs. Grimes give Patty a slip of paper with his name. It was either that he was down there trying to sell stolen cars or cars were for sale, one of the two.

Q Now when would it have been that Jackie I gave Patty a piece of paper about Nick Dezes trying to sell stolen cars?

A I didn't say that. It was either two cars that he had for sale, or what. It has been a long time ago.

Q A long time ago. How long ago was it, Mr. Scallio?

A I think about I guess in '82 or '83. Somewhere in that area.

Q Well, would it have been during the time that you and Jackie and Pete were all working out of the same property basically?

A Yes, ma'am. Because we were wholesaling out of a back office and we had rented back from him the back office and a place to store 30 cars because I had another storage lot where I could store over a hundred cars and that was the general location.

Q Now let's talk about the car business a little bit.

A Yes, ma'am.

Q And let's confine ourselves to the years 1980 or '81 to [1251] the present. In 1981 what cars—Well, let me back up a second.

When were you and Mrs. Scallio, married?

A I would hate to be ignorant but I am not sure. My mind is very very, I have been tortured a whole lot lately and I am not really clear.

Q Do you know your anniversary in terms of, months, days?

A Please, I am sorry I can't tell you what month. I apologize to my wife and you but I can't tell you.

Q Do you know the year?

A I think it was in '81 or '82.

Q You think you have been married about five years, you think that is about right?

A Yes, ma'am.

Q Let's start then in 1981?

A Okay.

Q Just for the sake of argument we will assume that you got married around that time. What business were you in, you yourself, Sam Scallio?

A I was in the horse business.

Q What aspect of the horse business?

A Thoroughbreds, raising and training.

Q Where?

A In Ocala, Florida. And I also was in the automobile business there.

[1252] Q When you were in Ocala, Florida, was Patty with you?

A No, ma'am.

Q So that was prior to your marriage, you think?

A Yes, ma'am.

Q Let's stay to the time since your marriage?

A You just asked me about the prior times.

THE COURT: Just hold it.

THE WITNESS: I am trying to answer the questions.

THE COURT: Don't answer without any question now.—  
You will be better off.

THE WITNESS: Go ahead.

THE COURT: You will be better off answering questions.

Q I am not trying to confuse you. I am just trying to establish some dates. When you were in Florida Mrs. Scallio was not with you, is that correct?

A No, ma'am.

Q You married her when you were back up here?

A Yes, ma'am. I was back up here about a year I would say, or I think I was back in the 1980 I think I came back.

Q Sometime during the first year back you met and married Mrs. Scallio?

A Yes, ma'am.

Q Now during that first year after you came back from Ocala, Florida, what business were you in?

[1253] A Again I will answer. I still had some horses left that I was selling and I had an automobile business and, in Florida, and I had an automobile business that I opened up wholesale in Glen Bernie, Maryland.

Q What was the name of your business in Glen Bernie?

A I think I was trading under American Auto Sales then.

Q That was a business actually in Patty's name then, is that correct?

A I would have to look at the Department of Motor Vehicles because I thought that I had applied for the license and I had got the license in my name the first time we opened American Auto Sales.

Q Can you get a license in a corporate name?

A I have never had a license in a corporate license. Yes, ma'am. You can get a license in a corporate name as long as they approve it and as long as you have insurance.

Q At the time you and Patty were married what business was she in?

A She was Holiday Spa training with guy stuff, and she did beautician work on the side, and she also was a bookkeeper for automobiles, and I know she had previous training in the restaurant business, and if you want me to go on I can go on and on if you want me to.

Q What assets did she have when you married her?

A I wasn't interested in her assets.

[1254] THE COURT: The question was what did she have not what you were interested in. Did she have any or what, if anything, did she have?

A I don't know.

Q Well, did she have a house when you married her?

A No.

Q Did she have a car?

A Yes.

Q Was it a car that you had sold her or given her?

A No, ma'am.

Q Did she have any real estate?

A Not to my knowledge.

Q Did she have any stocks or bonds?



A I never asked her. I don't know.

Q You have no knowledge ever that?

A No.

Q Did she have any, own any businesses?

A No, not to my knowledge.

Q Did she have any substantial personal property like diamonds and furs and fancy cars?

A She had some rings.

Q Where did she get those?

A I didn't question her. I don't look at her hand and say where did you get your ring.

Q They weren't rings that you gave her, in other words?

[1255] A No.

Q So she had those. Did she have any other assets?

A I really don't question people what they have or what they don't have. No, I don't know.

Q Now in 1981 did you file a tax return for the year 1981?

A I couldn't tell you. I am sure you could tell me though but I couldn't tell you.

Q Did your wife file a tax return for 1981?

A That I positively cannot tell you. I don't know.

Q Well, Mr. Scallio, you had some trouble with the tax authorities previously, have you not?

A Yes, ma'am. For the last I guess a long time I have had a lot of trouble with the tax people.

Q Where you were convicted of felonies?

A Not felonies.

Q Felony?

A Right.

Q When were you convicted?

A I think it was in 1975 or '77. You got the date there I am sure.

Q You went to jail for that?

A Yes, ma'am, I did. I pleaded guilty and I received 60 days in the Orlando City Jail. And I received 22 months parole and never once missed a date and never once had a mark against me from the institution that I served the 60 days for [1256] or from the parole officer.

Q And that was not your only conviction, is that correct, Mr. Scallio?

A As a juvenile, no, ma'am.

Q I am not interested in juvenile matters, Mr. Scallio. You were recently convicted in Mobile for the unlawful possession of this particular weapon, is that correct?

A Oh, yes, ma'am. And that thing didn't even fire. It was broke open.

THE COURT: The question is whether or not you were convicted. Were you convicted?

THE WITNESS: Yes, sir, I sure was.

Q And your conviction was being in possession of that weapon when you were a felon, convicted felon?

A No, ma'am. It wasn't me being in possession of it because I wasn't even there when they took it. So I couldn't have been in possession of it.

THE COURT: The question was: Were you convicted of possession of that gun?

THE WITNESS: No, I wasn't convicted of possession of that.

Q Well what were you convicted of, Mr. Scallio?

A The Court of Appeals is trying to find out now what I was convicted of.

THE COURT: No, no, Mr. Scallio. Were you found [1257] guilty by a jury or a Court?

THE WITNESS: I was found guilty by Judge Haine (phonetic).

Q You were found guilty by a jury just like this, weren't you, Mr. Scallio?

A Yes.

Q Now let's go back to 1981. You and Patty were married and your business at that time was American Auto Sales?

A Yes, ma'am.

Q What is the, if you can tell us, the gross amount of business that you did for 1981?

A The gross amount I did?

Q Yes?

A A couple of million, a few million.

Q A couple of million what? A couple of million cars?

A Now, I sold 3000 cars a year. The I.R.S. will tell you. I averaged 3,000 cars a year or better.

Q For 1981?

A In the year of 1981 I may have sold that many cars.

Q You don't know?

A No.

Q Did you maintain records for your business that would reflect that?

A Very poor. That's one of my problems with the tax people, very poor.

[1258] Q But you did maintain records?

A Bits and pieces.

Q And you did have an accountant, correct?

A No, I didn't have an accountant.

Q Who is Curt Giesler (phonetic)?

A Curt Giesler is just a nice guy who would send the tax form in for me every year and told me that he didn't want to be my accountant because I didn't keep records correctly.

Q We will come back to that in a little while, Mr. Scallio. How much did you make in 1981?

A Well, you could ask that question two ways: How much did you declare or how much did you make?

Q Well, let's ask it all those ways. How much did you make from the car business, reported or unreported, how much did you make for 1981?

A I don't know.

Q How much did you report for 1981?

A Again, I don't remember.

Q Would your tax returns accurately reflect the amount that you made?

A No, they wouldn't accurately reflect it.

Q So you were cheating on your taxes in 1981?

A I just am a very bad bookkeeper, I guess.

Q Well, are you a bad bookkeeper or did you under report your income?

[1259] A That is for you to decide.

THE COURT: No, Mr. Scallio, you have to answer the questions. We are not here to debate. That is why you have an attorney he makes argument. If you don't know you answer you don't know, if you know answer the question. You have to answer the question, sir?

THE WITNESS: I don't know.

Can I ask you something, Your Honor?

THE COURT: What's that.

THE WITNESS: Is this a tax case I am in?

THE COURT: Mr. Scallio, answer the questions that the U.S. Attorney is propounding. The questions, if they are not proper questions I am certain your counsel or the Court would certainly stop them from asking any questions that are not proper. I don't hesitate to tell the U.S. Attorney they are not proper questions but, these are proper questions under the circumstances of this case and you have to answer them, sir.

THE WITNESS: Thank you.

THE COURT: All right.

Q The question I believe was: Did you under report your income on your taxes for 1981?

A Evidentially, I did.

Q Well, do you know that you did?

A I am not sure whether I did or I didn't. I don't know [1260] what is fair and what is not fair for taxes I am saying I don't know. If you want to keep asking me over and over I will say I don't know.

Q Mr. Scallio, if you filed a personal tax return for 1981, you must have stated on it a certain amount of income, do you know what income is?

A It is money you take in.

Q Now was the amount of income that you stated accurate or inaccurate?

A inaccurate.

Q How do you know that?

A Because it is always inaccurate. I am not a bookkeeper.

Q It is always inaccurate because you are sloppy about keeping the books or you just don't feel like the I.R.S. ought to know everything that you take in?

A Probably I really feel both ways about the I.R.S.

Q I am just trying to find out what you did. Now is it your contention that you made a lot more money in 1981 than you reported on your income tax?

A I hope I did.

Q You hope you did?

A Yes.

Q And if you under reported your income in 1981 that would have been willful on your part, do you know what I mean?

A Well, I am not sure if it was willful, because I didn't [1261] keep good records.

Q Wasn't it willful to keep bad records so So the I.R.S. wouldn't find out what your income was?

THE COURT: I think we are getting into a debate now. He has answered all your questions.

Q All right. Now in 1981, you were broke, were you not?

A Ma'am.

Q Were you broke in 1981?

A Oh no, ma'am. I can assure you of that.

Q Well didn't you tell Preston Tate that you borrowed \$5,000.00 from him and needed money?

A You should have ask Mr. Tate.

THE COURT: Mr. Scallio, I am not going to let you debate, did you tell him that, that is the questions?

A No, I did not.

THE COURT: All right.

Q Now in 1982 did you file income tax returns?



A I assume I filed them some kind of income tax.

Q Did you state your income on your income tax return?

A I must have. You know, I put something down there.

Q Are your 1982 tax returns accurate?

A No, ma'am.

Q Why do you say they are not accurate?

A Because I am a bad bookkeeper.

Q Same as 1981?

[1262] A I have always been a bad bookkeeper.

Q Now do you believe that your 1982 tax returns understate your income for that year?

A You have asked me that question before.

THE COURT: No, she is talking about the next year. She is talking about 1982.

THE WITNESS: Say it again.

Q Do you believe that your 1982 tax return understate your income?

A Understate. More than likely, yes, ma'am.

Q And that was on purpose?

A No, ma'am. I wouldn't do that on purpose to the I.R.S.

Q Mr. Scallio, I may not have heard you correctly before but, I think you testified in response to an earlier question that you kind of hoped that your bad bookkeeping would keep certain information from the I.R.S.?

MR. PARKMAN: I am going to object to that and she is arguing the evidence and not what the witness said.

THE COURT: This is cross-examination, though. Did you or did you not say that? That the whole point.

THE WITNESS: I have said a lot of things here. If she said I said it and it is in the record then I said it.

Q Let me ask you the question again, Mr. Scallio, you under reported your income for 1982, correct?

A Yes, ma'am.

[1263] Q And you know that you did that?

A I didn't say that I know that I did that, you did.

THE COURT: Come on. Let's not debate the answers. Did you know or didn't you know?

THE WITNESS: No.

THE COURT: You didn't know?

THE WITNESS: I don't know whether I did or I didn't. I just put down what I put down. That is plain and simple.

Q You just put down what you felt like on your tax returns?

A There are some answers that doesn't have a yes or no and that is plain.

Q When you filled out your tax returns for 1982 you put down a figure for income, correct?

A I didn't hear you.

Q Did you or did you not put down a figure for income on your 1982 tax returns?

A Did I or didn't? Yes, I did.

Q I can't hear you?

A I can hear you and I am thinking give me time. Yes, I put a figure down.

Q Where did you get that figure?

A Off of a scratch sheet I had wrote down somewhere. I just wrote it down. Just thought up some cars and wrote it down. I don't know. I wrote it down.

Q And it is your belief that that was not an accurate [1264] reflection of all the business you did in '82?

A Yeah, I guess it is not all the business or whatever you want to call it.

Q Let's go to 1983, Mr. Scallio. Did you file a tax return for 1983?

A I am sure that I filed, I am almost sure that there is a tax form for 1983.

THE COURT: You have to keep your voice up, sir.

THE WITNESS: I am sure you have a tax form for 1983.

Q Did you put an income figure for 1983?

A Just the same as the other year you are about to ask me. All the same way.

Q You just kind of come up with a figure, put it down, and you know now that it was not the actual amount of your business?

A It is not that I know or not that I don't know it. It is just what I find laying around on a piece of paper and I give it to the bookkeep.

Q So you made absolutely no effort to be accurate on your tax return?

A I made an effort but I never can quite get it right. And I never seem to have enough time to keep tabs on what I am doing.

Q Did you have an accountant?

A No, I didn't.

[1265] Q You had Mr. Giesler who would do your tax return?

A No. The only thing he would do is at the end of the year is fill that sheet of paper out for me and I would mail in a money order.

Q Mr. Geisler filled out the 1040 Form, is that correct?

A Yes.

Q And he did that from the information you gave him, correct?

A Well, I would give him a little scratch piece of paper and say there are some cars..

Q You gave him a little scratch of paper, you just listed a few cars on it, is that correct?

A Yes.

Q And you said that was the extent of your income for that year?

A Yes.

Q And American Auto Sales also had the books and records of the cars that are were traded through that company for any given year, is that correct?

A Well, that is another horse, isn't it?

Q The horse I am coming to, Mr. Scallio. Now the list that you gave your accountant was just a list of cars that you came up with out of your own memory, is that correct?

A Yes, ma'am.

[1266] Q There are also lists that Mr. Geisler made for you based on his review of your checking account?

A No, ma'am.

Q He didn't keep records like that?

A No, he didn't.

Q Did Patty keep records for you like that?

A No, nobody kept my records for me. She kept her own records.

Q She kept her own records. What did her own records contain?

A I don't have no idea. I don't pay any attention to mine I am surely not going to look at someone elses.

Q I am not sure I understand the relationship between you and your wife and American Auto Sales?

A The relationship is that that is my wife. And American Auto Sales, I am not the only person that bought for American Auto Sales and if you want me to explain it to you I will.

Q Please do?

A I can take any one of you sitting at that table and you can buy and sell cars for American Auto Sales and you would be an independent contractor and you would be eligible to handle your own taxes and all your own problems. And that is what working under another dealership's name is and independent contractor.

Q Who were, in 1981, the independent contractors working [1267] under the name American Auto Sales?

A There are were half a dozen guys who used to buy under.

Q Who were they?

A I think Milton Jones, that is Milton's son. Who was it? I think a guy named Harry Campbell bought some cars under that name. Who else did we have there? Some dealers would come in and buy cars under our name and tell us they bought them and I would say okay give me \$50.00 for using my name, for letting them buy under our name. So they would give me \$50.00 for letting them buy under our name.

Q So let me see if I get this right?

A But there were three or four or five difference guys that would buy under our name.

Q In any given year?

A Yes.

Q Is that reflected somewhere on the records of American Auto Sales who bought this and who sold that?

A Not on mine.

Q I am talking about on the records of the business?

A No, they have kept their own records of what they bought and sold.

Q Who are they?

A I think a guy named Richard.

Q Richard who?

A Richard Bobalitz (phonetic), the manager, one of the [1268] managers of Tate would also buy, a tall gray haired guy. I am sorry. I can get his name for you if you want me to stop. I can go get his name and bring it back. As a matter of fact, I can get the names if you want and give them to you later.

Q Maybe at a break we can do that, Mr. Scallio, if it is necessary. What I want to find out now American Auto Sales is an entity and any number of people can work under that name, is that accurate?

A Not only American Auto Sale but any dealer if you let them buy some cars.

Q I am not talking about any other dealer. I am talking about American Auto Sale from 1981 through 1984. Now am I correct that based on what you said that anybody could trade under that name if they secured your permission in advance?

A Yes, and they could do it without permission probably.

Q Yes. Okay. Now so that means then that the books or records of American Auto Sales would reflect all of the sales of all of those people, correct, not broken down by individuals?

A I don't know what you are talking about. I don't understand you.



Q American Auto Sales is a business and anybody can trade under that and at any given time there are were four or five guys trading under that name?

A I didn't say four or five guys all the time. You asked me [1269] about a couple of years there and I give you some names. I didn't say every day they were in and out buying and selling cars. I didn't say that at all.

Q Try to explain to me so I can understand it. Some people other than yourself traded under the name of American Auto Sales at any given time?

A They could have unbeknownst to me at any given time, yes.

THE COURT: I think the question is, let's get to the end of this.

THE WITNESS: Yes.

THE COURT: How many people do you know from your personal knowledge trading under the American Sales for say from when was it?

THE WITNESS: 1980 through 1984, I imagine.

THE COURT: 1980 through 1984.

THE WITNESS: It may be four or five.

THE COURT: Mr. Scallio, that you know not who could have, who actually did.

THE WITNESS: There may be four or five different people.

THE COURT: Mr. Scallio, you got to listen to the question. You can't talk. I am trying to get to the end of this. I think this is the question: How many do you know trading under the name, I think it is a proper question, under the name of American Sales?

[1270] THE WITNESS: American Auto Sales.

THE COURT: American Auto Sales, during this period of time? I think that is what the question is.

THE WITNESS: Between 4 and 5.

THE COURT: All right.

Q And those are some of the names that you previously mentioned?

A Yes, ma'am.

Q Were you trading under any name other than American Auto Sales?

A We all buy under each others names. Certainly I buy some cars under some other people's names.

Q And you also transacted business under the name of American Auto Appraisals, is that correct?

A You couldn't buy and sell cars under American Auto Appraisals—

Q I know that. I mean you had income from that company?

A Yes, ma'am for appraising cars for people.

Q Let's see where you got your income from in 1981?

A Yes.

Q Auto sales?

A Yes.

Q American Auto Sales?

A Yes.

Q Trading under other names?

[1271] A Yes, ma'am.

Q What other names?

A If I was buying cars for a certain dealer I would just buy them in his name.

Q They would be cars that he would sell?

A No, they were cars that I sold to him that he would sell.

Q So if you are acting as a wholesaler—

A Yes, ma'am.

Q —you are not buying and selling in your own name, you are just buying and selling in the name of whatever retailer you are selling to?

A In some occasions.

Q What occasions?

A You can't narrow it down what occasions. I said in some occasions.

Q Sometimes you would buy—

A You can't narrow it all down. You are talking about the car business. It is a big business.

Q I understand that.

A I can sit here all day and talk to you about the car business if you want me to explain it.

Q I don't think we need to spend all day but I would like to try to find out what we are dealing with here. Let's go back to 1981. Your income came from appraisals.

THE COURT: Mrs. Sale, you are going back over of the [1272] same thing. I think we just got stuck on the first part. I think it is up to the jury if they can understand his testimony. Am I to understand your testimony that some other auto sales or whatever you would buy a car in their name and you would sell it to them and you would make money?

THE WITNESS: Yes, sir.

THE COURT: And that was not reflected in any of your other businesses, is that what we are talking about?

THE WITNESS: Yes, sir.

THE COURT: Maybe that answers your question.

Q How much money did you make, being accurate, in 1981?

A I don't know how much money I made. I made money.

Q You made what?

A I made money.

Q Well, let me show you what has previously been marked for identification as Government's Exhibit Number 61 A, B and C. These are certified copies of tax returns. I show you Government's Exhibit Number 61 A, and I ask you if that is your tax return filed by you on April 14th, 1982?

A Yes, ma'am, that looks like it.

Q That is your signature?

A Yes.

Q And Government's Exhibit Number 61 B, take a look at that and see if your signature appears on there?

A Mr. Geisler's.

[1273] Q Yours is there, though, is it not?

A Yes, ma'am, but the bookkeepers isn't there which you said.

THE COURT: The question is whether yours is there. Is your name there?

THE WITNESS: Yes, sir, it is there.

Q Now Government's Exhibit Number 61 C, take a look through there and see if that is, in fact, the income tax you filed in 1983?

A His signature is not there.

Q But your signature is there?

A I was wondering why you kept asking me about him.

MS. SALE: I move the admission of Government's Exhibit Number 61 A, B and C. They are certified copies of the tax records.

THE COURT: All right.

(The tax forms referred to above were marked as Government's Exhibits Nos. 61 A, B, and C, respectively, and received in evidence.)

Q Mr. Scallio, how much income did you report for 1981, the first one, 6 A?

A I have no idea.

THE COURT: She wants you to look at your tax return.

Q Look at your tax return, Mr. Scallio?

A I don't really know how to read this to tell you the [1274] truth.

THE COURT: Maybe you can ask him a question.

Q Look at the bottom of the first page where it says adjusted gross income and read the figure there?

A The bottom of the first page.

Q The bottom of the first page of the 1040 form?

A At the bottom it says 15,146.50.

Q \$15,146.50?

A Right.

Q Look at the next one please, Government's Exhibit Number 61 B?

A Yes, ma'am.

Q Again the same line, the adjusted gross income?

A 34,525.00.

Q \$34,525.00 for that year and that was in 1982, is that correct?

A Yes.

Q Look at the third one, the 1983 tax return?

A 70,500.00

Q \$70,500.00, is that correct?

A Yes.

Q Now do those figures accurately state the income that you received from the car business and the appraisal business for those years?

A I wouldn't say they are completely accurate, no.

[1275] Q They are not completely accurate? Given those figures as a starting point how much did you make in 1981? You reported 16,000, how much did you make?

MR. PARKMAN: Judge, I have to object.

THE COURT: I think we have gone over this. I think the record reflects what he reported. I think his testimony—

MS. SALE: I am trying to see if we can come up with a figure, Your Honor.

THE COURT: I think you have asked him a number of times and he says he couldn't.

Q There is no way you can tell me how much you made in that year, that's all I want to establish?

A No.

MR. PARKMAN: Judge.

THE COURT: I think she can ask that.

MR. PARKMAN: Okay, sir.

Q Now, Mr. Scallio, the home on Elizabeth Road was in your wife's name and not in your name, is that correct?

A Every home I have ever owned was in my wife's name, previous or this wife.

Q That is also true of the house you had on Margate Road, is that correct?

A Yes, ma'am.

THE COURT: Where was that home located?

[1276] Q Where is that home on Margate located?



THE COURT: Are we talking about homes in Maryland?

THE WITNESS: Glen Bernie, Maryland. I don't remember the address, Your Honor.

THE COURT: I just want to know what state.

A Are you talking about the horse farm that I had in Florida in the '60's and 70's?

Q No, sir. We are talk about 1980 to the present time. The two homes in Glen Bernie, Maryland. The one at Margate Road that you sold to your brother, Robert, and the one on Elizbeth Road which you sold to Mike Swidowich, those were both in your wife's name, is that correct?

A Yes, ma'am.

Q And the business property at 502 Crain Highway is also in your wife's name, is that correct?

A She bought that on time, yes.

Q And she had two other rental properties too? She had two other rental properties, is that correct?

A They were bought through the bank and on time, yes, ma'am.

Q And those are both car lots?

A No, ma'am, I don't think they are.

Q What are they?

A I think one of them is a little tiny building or something. It didn't have any zoning on it. I have no idea what you are talking about. You got to get some addresses and [1277] locations and stuff like that.

Q 7633 Baltimore-Annapolis Boulevard, the business property?

A That was a car lot, and and house, and a garage.

Q 419 Mayo Road?

A Okay. That was a little tiny place that had a, I think a plumber, some sort of business in it.

Q What other properties, residential or business, did you and/or Patty own in 1982?

A And/or Patty?

Q Yes?

A 502 Crain Highway.

Q I mentioned that?

A You didn't mention that.

Q 502 Crain Highway was the business property?

A And 504. They are together. I have had that since 1960.

Q Now we have got two houses and three business properties. Is there anything else that either you or Patty or the two of you jointly, or a business owned by either one of you owned in the 1982?

A Are you trying to say that they are still owned or they are owned or they was owned?

Q 1982?

A No, in 1982, no, Mayo Road, and Baltimore-Annapolis Boulevard was not anything to do with us whatsoever.

Q You didn't purchase those in 1982?

[1278] A Not to my knowledge.

Q Did you sell them in 1982?

A No.

Q 1983, did you buy Dino's?

A In 1983? I am not sure but, I think that we made a loan from the bank. I think Patty made a loan from a bank to get Dino's.

Q How much did Patty borrow from the bank to purchase Dino's?

A Would \$200,000.00 be right?

Q You tell me?

A I don't know. I am just taking a wild guess at that.

Q Don't take a wild guess. This is your trial, Mr. Scallio. Did Patty borrow money to purchase Dino's?

A Yes, she did.

Q What bank did she borrow it from?

A The Glen Bernie bank in Glen Bernie, Maryland.

Q How much did she borrow as closely as you can tell us?

A I don't know why \$200,000.00 sticks in my head.

Q How much did you have to put down to purchase Dino's?

A I can't really remember.

Q Would 10,000 sound right?

A Oh, yeah.

Q And that was money that you gave to Annette Phillips?

A Yes, ma'am.

[1279] Q And subsequent to putting that \$10,000.00 down you or Patty loaned money to Dino's, is that correct, put money into Dino's in the way of a loan?

A I don't understand what you are talking about.

Q If you had to go out and buy something for Dino's like china did you just go out and buy it?

A If we needed things we would buy it.

THE COURT: The question is simply: Did you spend in addition to making your down payment, did you spend any money, other monies, to open it up?

THE WITNESS: It was a completely functional place. That had been functioning for 25 years.

THE COURT: The question is: Did you spend any additional monies?

THE WITNESS: Yeah, you are always spending money on a restuarant.

THE COURT: I think that might be, and you can proceed from there.

Q Did you make any money from Dino's in 1983, Mr. Scallio?

A That I cannot tell you.

Q Did you make any money from Dino's in 1984?

A I can't tell you but I think we made about \$500,000.00 on the sale of it, wasn't it? If you have the records there.

Q On the sale of it?

A Yes.

[1280] Q That is to the best of your recollection how much you made?

A I would say it was some figure like that. With interest.

Q Now when you moved to Alabama, that was in June of 1984, is that correct?

A Yes, ma'am. Somewhere about.

Q What did you take with you when you went?

A Myself and my family.

Q What car or cars or other vehicles did you take?

A Oh, I took a truck.

Q What kind of a truck?

A I think it was a Ford, Ford truck, red and white.

Q Pick up truck?

A A big truck, big four wheel red and white truck.

Q A straight job or a tractor trailer?

A You can pull anything with that.

THE COURT: Sir, I can't hear you. Your voice is dropping again.

A I thought I was talking loud enough. It was called a toter, a fifth wheel. It is designed strictly to tow with.

Q What other vehicles or cars or whatever, did you take with you to Alabama?

A A LaShara (phonetic).

Q What is a LaShara?

A A mini-motor home.

[1281] Q Did you live in that on your way down?

A Yes, ma'am. That is just a little tiny thing.

Q What cars?

A It is hard to say. I buy and sell cars everywhere.

THE COURT: The question was: What cars did you take to Alabama?

THE WITNESS: If the question is what cars, what month? The first month or through the time I lived there or what?

Q No. Now we are talking about when you move there, when you left Baltimore and went to Alabama?

A You can only drive one at a time.

Q So you only drove the motor or home?

A The LaShara, yes.

Q You didn't have any cars there?

A No, that's all we took. We could only take one at a time.

Q Now you got to Alabama?

A Yes.

Q And you purchased the home at 559 North Mobile Street, is that correct?

A We road around and looked around, yes.

Q You road around for a while and you settled on Fairhope is a nice place to live, is that correct?

A It looks like the Eastern Shore of Maryland, yes, exactly the duplicate of it.

[1282] Q And when you got there what did you do, ask around until you found a house for sale?

A It is normal procedure. You drive around, shop around I guess is what people call it.

Q So you found a house at 559 North Mobile Street, is that correct?

A Yes, ma'am.

Q And you bought that house for \$300,000.00, is that correct?

A No, ma'am. That's what you said.

Q I am not testifying in this trial, Mr. Scallio. How much do you say that you purchased that home for?

A 120.

Q So would when Mr. Mills came in here and testified that you paid \$300,000.00 in cash in brown paper bags and in three different installments he was wrong?

A You should have asked him about all that money he had in his house.

THE COURT: Mr. Scallio, I am not going to let you keep debating. If you can answer he question answer it. Let's not go off in these discussions. Either did he or didn't he?

THE WITNESS: I said, no, she is the one that is debating me.

THE COURT: No, no, no. I think you are responding



[1283] THE WITNESS: I answered the question properly.

THE COURT: The question was: Did you pay \$300,000.00?

THE WITNESS: I said, no.

THE COURT: All right.

Q the next question was: Was Mr. Mills inaccurate when he testified that you did pay \$300,000.00?

A That would be a matter of your opinion. It would be inaccurate to me.

Q You sat here and you heard him testify?

A I heard him.

Q According to you, Mr. Scallio, was he lying or was he wrong when he testified about that?

MR. PARKMAN: I am going to object to the form of that question, Your Honor.

THE COURT: The way Mr. Scallio answered I think that is a proper question. Mr. Scallio, was he incorrect or was he correct when he said you paid \$300,000.00?

THE WITNESS: If I said one figure and he said another he is incorrect.

THE COURT: Mr. Scallio—

THE WITNESS: He is incorrect.

THE COURT: He is incorrect, is that correct?

THE WITNESS: Yes, sir.

[1284] THE COURT: All right, sir.

Q There came a time after you moved to Mobile when you purchased a different motor home, is that correct?

A Oh, I bought one for resale, yes.

Q You paid cash for that?

A Yes, ma'am.

Q How much was that one?

A I don't really remember how much I paid for that. We had a trade in. I traded something in and beat all around the bush and I think I sold it to, I don't recall where I sold it. One of those two motor homes was in Texas.

Q So you actually sold both of them?

A Yes, ma'am, both of them were sold.

Q First you sold the fifth wheel, the one you went down there with, you traded that in for the second one?

A I don't remember how I did it but, I know I traded something in. But they were all bought and resold, bought and resold, that is what I do buy and resell them.

Q Those you sold under the name of Reliable Used Cars, is that correct?

A As I told you you can buy and sell under other people's names.

THE COURT: Mr. Scallio, don't evade the question. Were they sold under Reliable Used Cars?

THE WITNESS: Yes.

[1285] THE COURT: All right.

Q The boats, you heard the man come in and testify about selling you the boats, you bought those in Alabama, is that correct?

A I am afraid to talk. I bought one and traded one in.

Q When you got there you kept it for a month or so?

A I put it in storage to resell. It was a good buy. So I put it in storage to resell it. It was pulled out of the water and put in a building to sell. I couldn't sell it. The guy said it was a bad unit to sell in that area. So I took it back over and the guy had a sale for it. I traded it in because he had a sale

for it. I traded that in because that was supposed to be a good seller, took it back there and he sold it, and he resold it for me.

Q Now so far, with the exception of trade-ins on the motor home and the boat, all of these transactions have been in cash, is that correct?

A I always paid cash, yes.

Q The Eldorado we have heard some testimony about last week, you purchased that, is that correct?

A That was a trade in for my car. We traded a car with that.

Q What car?

A I don't know whether it was the motor home or stationwagon.

[1286] Q Didn't you just say that you traded the motor home for the other motor home?

A We were doing so much wheeling and trading there you got me lost and I don't have it wrote down but, all those units we did trade and sell and I am not denying that at all and I did sell it. And the boats I sold. I did sell them.

Q And you bought them?

A And I did buy them, yes, ma'am.

Q And the Elorado there was some comment about in the transcript?

A There was a whole lot of comment about it. There were five of them up there. As a matter of fact, there were seven of them.

Q Seven what?

A Eldorado convertibles.

Q Did you own seven Eldorado convertibles?

A If I could have sold them I would have bought them.

Q The one you heard about, the fireman's red with the white interior, correct?

A Right.

Q The one you bought as you said in the transcript right off the showroom floor, correct?

A It is a figure of speech.

Q Did you pay cash for it?

A No.

[1287] Q What did you pay?

A I traded either a station wagon in or I am not sure. Anyway we trade something in on that unit.

Q If you traded a station wagon in on it there would have been a substantial difference on the price of the station wagon and the price of a brand new Eldorado convertible, wouldn't there?

A It depends what you paid for it and what of the station wagon was worth.

Q You have no recollection what you paid for that Eldorado?

A No, it was a trade in. So there is no real cash value there. You have to determine what the trade in is.

Q Is it your testimony, Mr. Scallio, whatever you traded in for the Eldorado it was more or less even steven, an equal trade?

A No, I gave some money in addition.

Q Do you remember how much money you had to come up with out of your own pocket for that car?

A No, I don't remember what it was.

Q Would it been more than 10,000?

A No. If I told you \$1.00 I wouldn't be telling you the truth. I am not sure what kind of deal we transacted with the dealer.

Q So you have no recollection?

A No.

[1288] Q Now the remodeling, you heard Mr. Purvis testify that he was paid \$54,000.00 in cash by you for remodeling at your home is that correct?

A Yes, ma'am.

Q That was accurate?

A No, I don't think it was accurate because he billed me for stuff, he would put bills of other people on my bill and I caught him a lot of times doing that.

Q So he cheated you?

A No, I didn't say he cheated me. I said that he would put other people's purchase bills. He would deliver stuff at another job and put the bills on my job. I didn't say he cheated me.

THE COURT: The question is: Did you pay him \$54,000.00 regardless of whose bills they were, did you pay him that money?

A It could have been somewhere in there. I don't want to talk about the man, okay.

Q And you also paid him a little more for a remodeling job he did in Santo's, is that correct?

A Yes, ma'am.

Q Where did you purchase Santo's?

A We didn't purchase Santo's.

Q How did you come to own it?

A We rented it.

[1289] Q You what?

A We rented it.

Q It was the kind of lease that you could do as you wished to the property though, I take it?

A Well, yeah. Yeah, you could do that, yes.

Q It was an operational restaurant at the time you got it?

A It was fully operational. It wasn't shut down. I mean it was fully operational.

Q So you just changed the name and—

A No, we—

Q You were fixing to open up under the name of Santo's?

A We changed the name. We shut it down. We shut it down. And we shut it down for either two months to clean it up and refurbish it and change the name. And I really wasn't too happy because I just tore that muscle. I was still having a leg problem.

Q And it was scheduled to open just after the first of the year?

A Yes, ma'am.

Q It did, in fact, open, didn't it?

A I think it was anywhere from 30 to 60 days after December, somewhere in that area.

Q So this was the beginning of 1985 that it actually opened?

A Yes, ma'am.

Q How much money did you have to lay out for the rent and [1290] refurbishing?

A I don't recollect. You will have to ask my wife, because I was busy getting products for the place to open.

Q And that was in her name too?

A Yes, ma'am.

Q Is there any business that you have ever had that has been in your own name?

A I have had so many businesses in my name it is unreal up until 1975 when I had trouble with the I.R.S., and you can check it, and there are many of them on record in the State of Maryland.



Q And ever since you went to jail for the tax fraud you—

A Filing gross income. You got it a little wrong.

Q Say it again?

A Filing gross income.

THE COURT: I am sorry. What was that?

THE WITNESS: Filing gross income is what I was charged with, not filing gross income.

THE COURT: Okay.

Q Well, ever since you went to—

THE COURT: Whatever it was you say that was the charge?

THE WITNESS: Yes, sir.

Q Ever since you went to jail for the tax problem that you had, all of your businesses have been in the name of someone [1291] other than you, is that correct?

A Yes, ma'am.

Q Now you heard a witness testify in this case by the name of Charles Eugene Perry, Jr., do you remember that?

A Yes, ma'am.

Q Now, Mr. Perry testified that you threatened him?

A Yes, ma'am.

Q Did you do that, Mr. Scallio?

A No, I didn't.

Q Have you ever threatened anybody, Mr. Scallio?

A I think I have been mad a few times and I couldn't deny that.

Q Have you ever said to anyone words to the effect that they could have a shotgun in their mouth?

A Not that I know of I haven't said that.

Q Have you ever caused anybody—

A I don't use a gun.

Q Well, up don't use a gun but you had the cane gun in your house, is that correct?

A It didn't function. It was glued together and they couldn't even make it work.

Q Was this glued together, Mr. Scallio?

A No, it wasn't. That didn't belong to me. If you check the bill of sale you will find out who it belonged to.

Q Who bought it?

[1292] A My wife Pat.

Q It didn't belong to you, did it?

A No.

Q Any more than any of those businesses did?

A If I had bought that gun I would have been charged with that. I was only charged with that one cane gun because all of them were taken at the same time.

Q Now you said you don't use a gun and never threatened anybody with a gun. Have you ever caused anyone to suffer any physical harm? Le me you a little more bluntly: Have you ever had anybody go out and beat someone up?

A No, I haven't.

Q You are certain of that?

A Positive.

Q And you wouldn't do anything like that, would you?

A I wouldn't need anybody to bet anybody up.

MS. SALE: Let me look at the exhibits for a moment, Your Honor.

(There was a pause in the proceedings.)

Q Mr. Scallio, I want to show you what's been admitted as Government's Exhibit Number 27 and just remind you that this is the list of chemicals which the expert testified about here the other day and which the handwriting expert indicated was in your handwriting on both sides of that. What does that say at the top line there?

[1293] A I can't—Phillip Ploin (phonetic)? I am sorry. I can't pronounce that.

Q Is that your handwriting?

A Did the handwriting expert say that that is my handwriting?

Q Yes, sir?

A Is that my fingerprints?

Q Mr. Scallio, try to answer the questions I ask you. Do you know what that word is on top? Yes or no?

A No.

Q Is it your handwriting?

A It appears to be, but a lot of handwriting appears to be.

Q The rest of the page appears to be your handwriting too?

A Some of it could be mine, some of it couldn't.

THE COURT: Keep your voice up.

THE WITNESS: Some of it could and some of it couldn't. You want to ask me a question about it?

Q Right there where it says: "Dissolves good in water. 40 percent bottom out bleach. Faint smell. 193 Centigrade burned out." Is that your handwriting?

A What is Centigrade?

THE COURT: Mr. Scallio.

THE WITNESS: Wait a minute. She is showing me something here that says C.

THE COURT: Mr. Scallio, let's stop. Is it your [1294] handwriting or isn't it? That is the only question you have to answer. You only have to answer questions. Let's don't get in any debate.

A I am going to say it looks like my handwriting. Okay?

THE COURT: That is his answer.

Q The second word where it say: "tertracaine"?

A Yes.

Q "Very little moisture. Dissolves water good. 30 percent bottom out bleach." What does that say next? Does that say orange colored?

A It looks like it, yeah.

Q Then it says, 130 with a C again?

A C. You got to stop putting words there.

Q The other side of the page where it says, new cut 130, real new cut 140, real old cut 120, is that your handwriting?

A It is close to my handwriting, yes, ma'am. Would you like to see my cut?

Q They are questions for your counsel if there is something that you want him to bring out, Mr. Scallio. Just answer the questions.

Now, Mr. Scallio, you heard Billy Grimes testify at the very outset that you loaned him \$14,000.00 to open up a video store, is that correct?

A I can't say yes to that because I thought he said in his statement \$12,000.00.

[1295] Q Did you loan him money, either 12 or a different amount, to open up a video store?

A No, ma'am, I did not directly lend him any moneis whatsoever.

Q Did you indirectly loan him money?

A No. I mean if you are talking about whether you put a lease in Patty's name, I put the phone bill in my name and I think the gas and electric was in my name because I had good credit with phone company and with the electric company. If you call that loaning money then I did it.

Q And Billy was going to operate that business that you and Patty was involved in?

A Well, he was going to operate it and run it and when the store got all put together, all of us would put up X amount of dollars for whatever the video tapes would cost and he would run it and take 50 percent of the profit and we would split the other are 50 percent.

Q Was that your money that he lost when he was arrested with cocaine in his car on July 25th, 1982?

A No, ma'am. He didn't lose any of my money.

Q You heard Billy Grimes testify that in the fall of 1982 he purchased half a pound, kilo, and multiple pound quantities of cocaine for you using your money from David Bruce Reimsnider, you heard him testify to that, is that correct?

A Can I ask you a question?

[1296] THE COURT: No, just answer the question and if you need an explanation or if you have an explanation.

A I heard him testify to that, yes, sir.

Q Was he inaccurate when he testified about that?

A Yes, ma'am.

Q You heard Jackie Grimes testify that during a similar period of time, from the late fall of 1982 into, up until March of 1983, she carried money from you for the purchase of cocaine to David Bruce Reimsnider on three occasions, was she inaccurate about that?

A Yes, ma'am.

Q In what respect was she inaccurate?

A In all suspects.

Q Never happened?

A Never happened.

Q So her entire testimony, according to you, is false?

A Oh, yes, ma'am.

Q Same with Billy Grimes?

A Same with Billy Grimes.

MS. SALE: If I may have just a moment, Your Honor.

(There was a pause in the proceedings.)

Q Just to recap, Jackie Grimes testimony was false according to you?

A Yes, ma'am.

Q Billy Grimes's testimony was false according to you?

[1297] A Yes, ma'am.

Q Mr. Mill's testimony was false about the amount of money you paid for his house?

A Definitely. I did the not give him that kind of money.

Q The whole prosecution in Alabama was a set up of some sort about the cane gun according to you, is that correct?

A Say that again.

Q You take issue with the whole—

A On the cane gun, right?

Q On the can gun?

A Yes.

Q According to you you were not appropriately or correctly found guilty in that?

A Yes, ma'am. I do feel that and I am not allowed to explain it but I do feel that.

Q One thing I neglected to ask you before, the names Larkin and Forteman, do you remember those?

A Are they—

Q Remember when Mr. Athas testified interpreting your conversation between you and Butch about the two other guys and he stated that in his opinion the two references were to Larkin and Fortmann, two guys that were convicted of large amounts of marijuana and were put on work realease pending appeal?

A I remember that conversation but I couldn't say it was [1298] them, because the news, I mean it was just Glen Bernie news. I mean we could have been talking about anyone at that time.

Q You knew those guys, is that correct?

A I did not know Mr.—

Q Bobby Larkin?

A Yeah.

Q You knew the other guy?

A He was an electrician in Glen Bernie and he did a lot of electrical work for all the restaurants.

Q Now the last thing I wanted to check with you, you are certain about the threat, that you have never threatened Mr. Perry?

A Positive.

Q And his testimony was false in that respect, is that correct?

A His testimony was false that I threatened him, that I myself threatened him, yes.

Q Well, did you have somebody else threaten him?



A No. It is not false I talked to him. I have spoken to him and it is not false that I have knowledge of him or spoken to him but I have never threatened that boy.

Q So you admit you had a conversation with him?

A I had a lot of conversations with him.

Q He testified that the conversation that you had with him concerning the threat was at Gino Jones's car lot, do you have [1299] any specific recollection of that?

A Of a Gino Jones's car lot?

Q Well, the conversation with Mr. Perry at Gino's?

A Oh, yes, ma'am, I do.

Q But insofar as that conversation was threatening you deny that?

A I did not threaten him.

Q Did you say that anybody would hurt him?

A I told him that anybody that would do that to another young boy that their fathers would be very very mad and probably some father would come get him for selling drugs or setting some little kid up. Yeah I did say that. I told him he shouldn't try to sell drugs to that girl's kid, and that's what I told him. And he will tell you if you would let him tell you the story. You didn't let him finish it all.

Q It is also your testimony that you never caused anybody to beat up on anybody else?

A Did I cause anybody to beat up on anybody else?

Q Yes?

A You mean did I pay them?

Q Yep?

A No.

MS. SALE: I have no further questions at this time, Your Honor.

THE COURT: Would you like to take a—  
[1300] MR. PARKMAN: Yes, sir.

THE COURT: Members of the jury we will take a short recess, please do not discuss the case or attempt to form any opinion.

(Brief recess taken.)

(After recess.)

(The following proceedings were had in open court in the presence and hearing of the jury:)

THE COURT: Yes, Mr. Parkman.

MR. PARKMAN: I have just a few questions, Your Honor.

THE COURT: Go ahead.

#### REDIRECT EXAMINATION

BY MR. PARKMAN:

Q Mr. Scallio, the first thing I want to start off with please, sir, is ask you if I could, how much formal education have you had?

A I didn't finish the 7th grade.

Q Have you had any courses or any type of schooling since that time?

A No, sir, not until just recently in the last six months.

Q I would like to hand you what has been marked—

MS. SALE: Can I see those?

MR. PARKMAN: Absolutely.

(There was a pause in the proceedings.)

[1301] Q I would like to hand you what has been previously marked for identification as Defendant's Exhibit Number 8, I believe, for identification purposes, and ask you if you could

please look at that and see if you recognize those three objects as a group?

A They are all the same one.

Q Would you please state for the ladies and gentlemen of the jury what do these indicate?

A That is a reefer truck, it has a reefer unit, we call them reefer units.

THE COURT: I can't hear you.

A That is a reefer truck, straight job with a hydraulic tailgate that I had at Santo's to haul Italian foods and frozen foods and it is for the restaurant and it has a reefer freezer unit on it.

Q All right. Now the three pictures, are those all concerning the same refer truck?

A Yes.

Q Do all three of these fairly and accurately depict a photograph of this truck? -

A Exactly.

Q Whose instruction is it?

A Santo's. It was my truck.

Q Okay, sir.

A We used it for the restaurant. We went back and fourth [1302] from New Orleans lens.

Q Now I would like to hand you what has been marked for identification as Defendant's Exhibit Number 9 as a collective group, and I would like to ask you please, sir, if you would look at those and see if you can identify those pictures?

A This truck was not with this trailer. This is a trailer that one third of it is a freezer box with a reefer on it, that was to haul frozen foods up and back. Three-quarters of it was a dry box to haul anything dry. It is two units. It looks like

one unit but, it is two units together if you look underneath there is a generator and a reefer but, another truck pulled this. You can pull it with any truck.

Q The term goose neck, does the term goose neck apply to this particular situation?

A This type of truck, this was a goose neck ball or it was on a fifth wheel ball and I had to have it changed so it could fit all trucks.

Q Do these fairly and accurately depict the situation with regards to this particular truck and trailer?

A Yes.

Q Who owned this?

A I did.

Q Now I would like to hand you what has been marked for identification as Defendant's Exhibit Number 10, I believe?

A A car hauler. I used it. It might have been '82 or '83. [1303] It has—

Q What is the purpose of this?

A It hauls anywhere from, if it is big cars, three, if it is small cars, four on the top ramp, and it only takes one in the bed, you could only put one in the bottom ramp.

Q Who owned this please, sir?

A I did. I owned a lot of car carriers.

Q I would like to ask you does this accurately depict the way this particular car trailer?

A Yes, that is a small rig. It don't haul very much.

MR. PARKMAN: Your Honor, at this time I would like to move for the introduction of Defendant's Exhibits Numbers 8, 9 and 10.

MS. SALE: No objection.

THE COURT: All right.

MR. PARKMAN: I would like to, if I could, show these and publish these to the jury at this time.

THE COURT: All right.

(The photographs referred to above was marked as Defendant's Exhibits Nos. 8, 9, and 10, respectively, and received in evidence.)

Q While they are looking at that, Mr. Scallio, so we can move along, I would like to hand you what has been previously introduced into evidence as Government's Exhibit Number 25 which were introduced as ledger sheets allegedly taken from [1304] your residence and in your handwriting. I would like to ask you if you would to look over that, please, sir, and see if you can identify that?

A They are what I call—

Q Do you recognize them?

A Yes.

Q Mr. Scallio, I would like to ask you is this your handwriting?

A It appears to be.

Q I would like to ask you, please, sir—

THE COURT: Keep your voice up.

THE WITNESS: That appears to be.

Q I would like to ask you, please, sir, do you know what records this is of, what it is about?

A They are the way I keep cars, scratch, a general idea of what I am doing.

Q Can you explain these records?

A Yes.

Q I would like to ask you please, sir, has anyone from the government ever asked you to explain this to them?

MS. SALE: Objection.

THE COURT: Sustain the objection. He doesn't have to respond to the government. I think he does not have to respond to the government. I don't think you want that in there. He has a right not to respond to the government.

[1305] MR. QUARLES: We move to strike that.

THE COURT: Strike the question and the answer.

MR. PARKMAN: One other thing please, sir.

Q You sat here and for at least a day you heard played to the ladies and gentlemen of the jury I believe four telephone calls in which they say you were a party, do you recollect that?

A Yes, sir.

Q Was that your voice?

A Yes, it was.

Q Will you, please, tell just very briefly and very quick, please tell the ladies and gentlemen of the jury what those calls were about?

A I was trying to sell the unit, two units, the black truck, and the trailer, and I was trying to sell the Cadillac Convertible, and I tried with many other people to sell them and I really had no need and I just wanted to turn my money so I was trying to sell them and I called a lot of other people.

Q Did any of those conversations have anything to do with any type of a coded drug conversation?

A No, it didn't, no.

MR. PARKMAN: Thank you, Mr. Scallio.

THE COURT: Any recross?

MS. SALE: Yes, Your Honor.

#### RE CROSS EXAMINATION

[1306] BY MS. SALE:

Q Now those trucks, Mr. Scallio, pictures of which are circulating, are they registered in your name or Patty's name?

A Let me see. That truck in the picture—the one truck, you asked me about the trucks, didn't you?

Q Yes?

A One truck doesn't belong to me.

Q Which one is that?

A The one that is hooked to the trailer. I sold that trailer separate from the truck. So the trailer was registered to Scallio Enterprises.

Q What is Scallio Enterprises?

A What is Scallio Enterprises?

Q Yes?

A It was for the truck. We were going to transport frozen sea food from there to there and Italian groceries from Little Italy to Alabama and it was going to be Scallio Enterprises and it didn't work out so I sold the rig.

Q And Scallio Enterprises is something that you formed in 1984 or early '85 for that purpose?

A We did it while we were in Alabama, yes, ma'am. As a matter of fact I think that truck was tagged under that name. And on the other truck, the short job with the reefer on it?

Q Yes, sir?

A That is tagged. You can look at it and see that is tagged [1307] in Santo's, and I am almost sure that truck carried an insurance policy under it in Alabama. The tag number is right on it and you can look at the tag number.

Q When did you purchase that truck?

A Right at the time that we were thinking about, when we were working on the restaurant.



Q Late '84, you purchased the truck with the—

A The short job.

Q With the freezer unit?

A Both of them had a freezer, both of them had reefers, both of them had generators on them. I purchased them both.

Q All right. The short job is the one you purchased the end of '84 when you were setting up the restaurant?

A Yes, ma'am.

Q And that you believe is titled in the name of Scallio Enterprises?

A You can read the tag number it and just call Alabama and give you who it is registered to.

Q Who did you buy it from?

A From an independent company. They have those books that sells cars and trucks in in 7/11, and I found it in a 7/11 store. I looked through the book. I kept looking through and I found the type of truck I wanted and I bought it from a company that sold cheese cakes and they had no more need for it because people were picking up cheese cakes from their [1308] factory.

Q You paid cash for it?

A Yes, ma'am.

Q How much?

A I think 22 hundred, 32 hundred, somewhere in there.

Q What about the other one?

A That is a used truck, by the way.

Q What about the other one?

A The truck is not mine. The trailer was.

Q What about that trailer?

A That trailer? That trailer was somewhere around eight, 78, 88, somewhere in there.

Q 88 what?

A Hundred.

Q Did you purchase that in Alabama too?

A No, that was from a company in Carolina somewhere.

Q Which one of those trucks were you intending to disguise as a travel trailer?

A I was intending to take the long one.

Q The long trailer?

A Yes, ma'am. Because I did not want to pay the taxes on the tags which cost \$10,000.00, plus you need a special permit to haul seafood over that state line and I didn't want to do that. So I would make money going up with the seafood in that area and bring my products back which I already set up at [1309] Pastore's and the guy in Little Italy. You cannot buy Italian products in lower Alabama. We had to go to New Orleans which was a shorter trip, smaller truck and less money.

And I set up with Pastore's where he is to ship stuff to me which I didn't need any way. He did ship paste to me through the mail and I went to an outside company and compared the prices. I did a lot of stuff.

Q How many trips did you take with either of those trucks up here to Baltimore?

A Never no trip with that truck there.

Q When you say that truck there?

A The short truck. The short truck is here in Maryland right now. It just was sold I think. It brought some of Patty's belongs with her. The long trailer I came once and twisted an ankle and I came up to pick up our furniture that was left and I wanted to see how it was going to haul and how

it was going to work out and I picked some furniture up and took it back to Alabama.

Q Mr. Scallio, you spent something like \$46,000.00 on new furniture in Alabama when you moved there, didn't you?

A I don't think I did.

Q You didn't buy any new furniture when you bought that new house?

A Oh, yes, ma'am. But I sold all the furniture we had in Maryland but what I brought back I had a bear, I had clothes, [1310] I had a stuffed bear that I have had for 20 years, I had some clothes. We had some personal belongings. Her old sewing machine. A couple of antiques I had for 20 years. You know, just your normal personal things. We had some nicknacks that I bought at auction and I had a bunch of junk. I had rakes, a hose.

Q That is the stuff, the junk to use your words, that you came up here to pick up and take back?

A I got the trailer and brought it up. That saved me from paying a moving company.

Q But you did pay for a moving company when you moved, didn't you?

A For some of the other stuff, yes, in the beginning. The first time.

Q Then you came up by yourself?

A Then I came up by myself. As a matter of fact, that trailer twisted an axle from under it and I had to have the axle welded in Glen Bernie.

Q Then you drove it back down?

A I loaded the truck up. I got some guys I knew to help me load all the junk on there, just wheel barrels, just, you know, normal stuff that you collect. So I loaded all the junk on and

went right straight back to Alabama with it. As a matter of fact, that boy that was in here helped me unload it.

Q Now, to go back to the question I asked you a minute ago, [1311] did you or did you not spend approximately \$46,000.00 on new furnishings for your house?

A I don't recollect what we spent.

Q Do you recall that you spent a substantial amount?

A We bought new furniture, yes, because I had sold all my other furniture, all the basic furniture I sold out of the other house.

Q You sold it to your brother when you sold the house, correct?

A No, I didn't sell it all to my brother. My brother didn't want it all. I sold it to about four or five different people. We called around and run an add and we sold the stuff to a lot of people.

Q When you were up here in December 4th or 5th, 1984, you didn't drive up that the you flew up, is that correct?

A What did you say?

Q When you came up here on December 4th or December 5th, 1984, you have didn't drive up you flew, is that correct?

A I am not really sure. My father was dieing at the time and we were moving stuff back and forth and I am not really sure.

MS. SALE: I have no further questions.

THE COURT: Any other questions?

MR. PARKMAN: No, sir.

THE COURT: Thank you. You can step down, sir.





MAR 17 1988

JOSEPH E. SPANIOLO, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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SAMUEL SCALLIO, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT*

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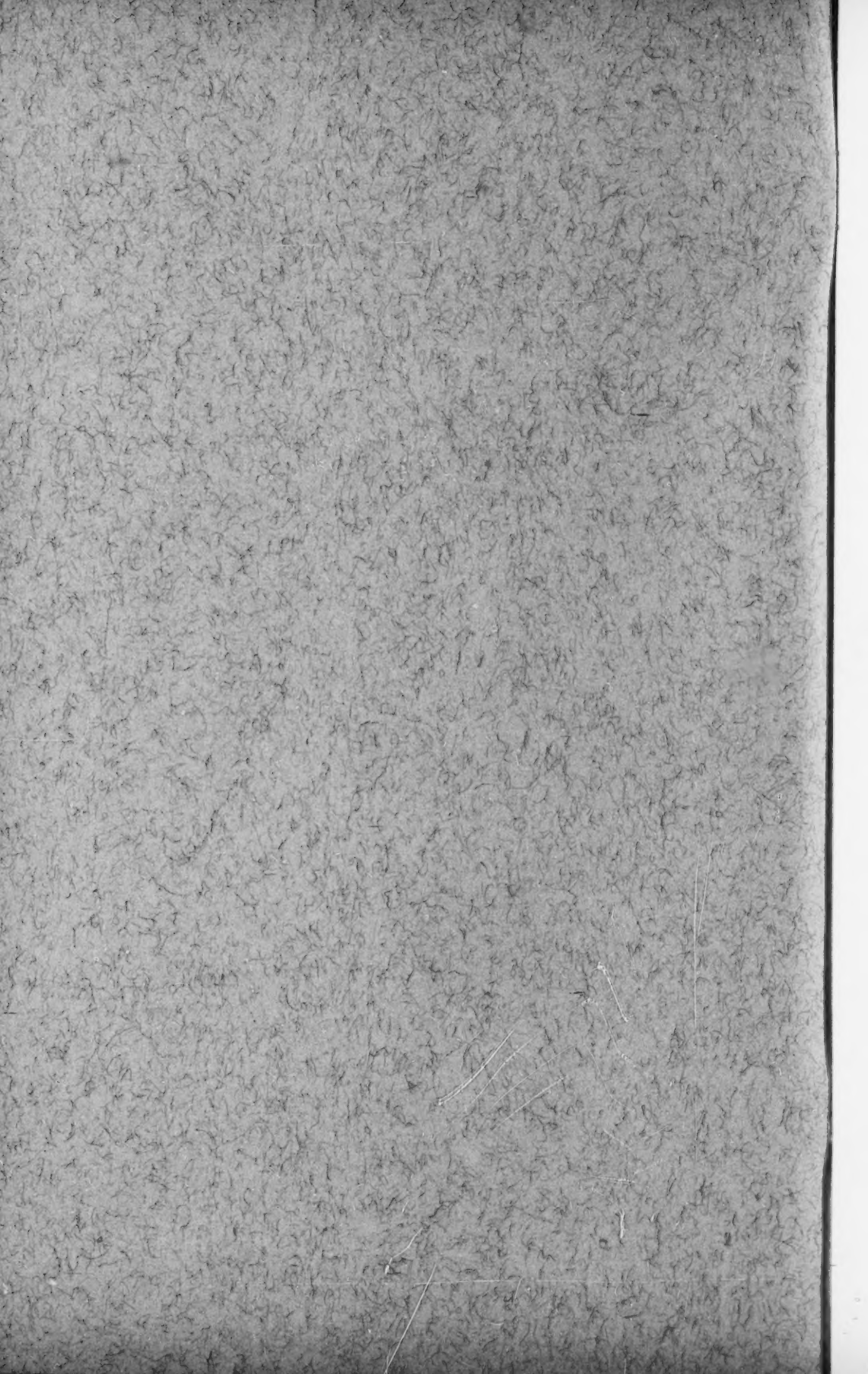
**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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CHARLES FRIED  
*Solicitor General*

WILLIAM F. WELD  
*Assistant Attorney General*

J. DOUGLAS WILSON  
*Attorney*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*





### **QUESTIONS PRESENTED**

1. Whether the jury instructions on the elements of a continuing criminal enterprise constituted plain error.
2. Whether there was sufficient evidence to support petitioner's conviction for engaging in a continuing criminal enterprise.
3. Whether the exclusion of certain impeachment evidence was harmless error.
4. Whether the district court committed plain error in directing petitioner to answer certain questions during cross-examination.



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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. C1-C10) is reported at 829 F.2d 37 (Table).

## **JURISDICTION**

The judgment of the court of appeals was entered on September 9, 1987. A petition for rehearing was denied on December 8, 1987. The petition for a writ of certiorari was filed on February 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 1); conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in

violation of 21 U.S.C. 846 (Count 2); use of a telephone to facilitate the offenses charged in Counts 1 and 2, in violation of 21 U.S.C. 843(b) (Count 3); interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3) and 2 (Count 4); and intimidating a witness with intent to prevent the communication of information relating to the commission of federal offenses, in violation of 18 U.S.C. 1512(a) and 2 (Count 6).<sup>1</sup> He was sentenced to an aggregate term of 35 years' imprisonment and was fined \$100,000. The court of appeals affirmed (Pet. App. C1-C10).

1. The evidence at trial is summarized in the government's brief in the court of appeals. It shows that between 1982 and 1984, petitioner directed a large cocaine distribution ring. In September 1982, petitioner was contacted by William Grimes, who offered to provide petitioner with a steady supply of cocaine. Over the next few months, William Grimes and his brother, Alton "Pete" Grimes, supplied petitioner with two to four pounds of cocaine on each of at least four occasions. Gov't C.A. Br. 6-7.

At the end of 1982, petitioner stopped using William Grimes as a source of cocaine. Thereafter, Pete Grimes' wife Jackie became petitioner's cocaine supplier. On at least three occasions in late 1982 and early 1983, she transferred money from petitioner to David Reimsnider, who in turn supplied cocaine for delivery to petitioner. Pet. 8-9; Gov't C.A. Br. 7.

The evidence established that there were several other members of petitioner's narcotics organization. For example, the prosecutor introduced lawfully intercepted telephone

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<sup>1</sup> Petitioner was acquitted on one count of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 5). Petitioner's wife and co-defendant, Patricia Lee Scallio, was convicted on the only count in which she was charged, conspiracy to distribute cocaine and to possess cocaine with intent to distribute it.

conversations in which Edward "Butch" Phillips, petitioner's associate and business partner, referred to petitioner frequently as "Boss" and engaged in coded discussions pertaining to narcotics. The evidence also identified Charles E. Perry, Jr., as one of petitioner's confederates. Perry agreed to cooperate with the authorities, and shortly thereafter, petitioner approached Perry and told him that "People who rat on people have someone come around and shove a gun down their throat and blow their head off." Gov't C.A. Br. 8-10.

On December 13, 1984, federal agents executed a search warrant at petitioner's residence. The agents found a ledger detailing numerous drug purchases in 1982 and 1983, as well as drug paraphernalia, formulas, substances used for cutting cocaine, and firearms. The narcotics ledger showed the quantities of cocaine purchased, the amounts paid for the cocaine, the degrees of purity, and the profits obtained upon resale. The ledger showed that petitioner had purchased a total of approximately 160 pounds of cocaine between May 1982 and December 1983, that he had grossed almost \$7 million in sales, and that he had netted more than \$2 million in profits. Gov't C.A. Br. 11-14.

Petitioner testified at trial and denied that he had ever been involved in the drug business as a purchaser, seller, or financier (Pet. App. G4-G5). On cross-examination, the prosecutor inquired at length about petitioner's tax returns during the years 1981-1983 (*id.* at G15-G45). After the prosecutor had asked several questions on that subject, petitioner asked the trial court, "Is this a tax case I am in?" (*id.* at G19). The court admonished petitioner to "answer the questions that the U.S. Attorney is propounding," and told petitioner that if the questions were improper, his counsel "would certainly stop them" (*ibid.*).

The district court charged the jury that to convict petitioner of a continuing criminal enterprise (21 U.S.C. 848)



under Count 1, it must find, beyond a reasonable doubt (C.A. App. 308):

First: That the defendant Samuel Scallio committed at least one of the violations of the federal narcotics laws specified in Counts II, III, and V of the indictment. These counts, as you have heard, charge a conspiracy to violate the federal narcotics laws and specific substantive offenses enumerated in the federal narcotics laws. Each of the overt acts described in the conspiracy count of the indictment alleges a felony violation of the federal laws.

The court also instructed the jury that under Section 848 the foregoing violation of the federal narcotics laws must be part of a "continuing series of violations" (C.A. App. 309):

[T]he term "series" generally means "three or more" and the term continuing means "enduring" existing for a definite period or intended to cover or apply to successive, similar occurrences.

Thus, you must find beyond a reasonable doubt that the defendant Samuel Scallio committed three or more successive violations of the federal narcotics laws within the period of time set forth in the indictment and with a single or substantially similar purpose.

Petitioner did not object to any of those instructions (Pet. App. C5).

—2. The court of appeals affirmed in an unpublished opinion (Pet. App. C1-C10). It rejected (*id.* at C5-C8) petitioner's challenge to the jury instructions on the elements of a continuing criminal enterprise. The court held (*id.* at C6) that although Count 1 specified only Counts 2 and 5 as predicate felonies, the trial court did not commit plain error by instructing the jury that Count 3 could also serve as a predicate offense. In so holding, the court of appeals explained (*ibid.*) that the first element of Section 848 re-

quires the government to prove that the defendant committed at least one felony violation of the narcotics laws. Because the jury convicted petitioner on Count 2 — which was charged as a predicate in Count 1 — petitioner could not have been prejudiced by the fact that the trial court also included Count 3 in its instruction as well. The court of appeals also rejected (Pet. App. C7-C8) the contention that the instructions permitted the jury to convict petitioner of a “continuing series of violations” based upon offenses not contained in Title 21. In addition, the court found (Pet. App. C4-C5) sufficient evidence that petitioner had organized, supervised, and managed at least five persons in the criminal enterprise. It also rejected (*id.* at C8) the claim that the trial court committed plain error in permitting the prosecutor to cross-examine petitioner about his tax returns. The court agreed (*id.* at C10) that the trial court should have allowed petitioner to call a witness to impeach the credibility of Jackie Grimes, a government witness, but it found that error to be harmless because Ms. Grimes’ testimony was cumulative and because her credibility had been “extensively challenged” during her cross-examination by defense counsel. Finally, the court held (*ibid.*) that it was harmless error to deny petitioner’s offer of an exculpatory statement made by Pete Grimes, whose co-conspirator declarations had been offered in the prosecutor’s direct case.

#### ARGUMENT

1. Petitioner raises two challenges to the jury instructions on the elements of a continuing criminal enterprise under 21 U.S.C. 848. First, petitioner argues (Pet. 16-21) that the district court erroneously invited the jury to rely on offenses other than those contained in Title 21 in deciding whether petitioner committed a “continuing series of violations” for purposes of Section 848. Second, petitioner claims

(Pet. 21-22) that the trial court impermissibly amended the indictment by instructing the jury that it could convict petitioner under Section 848 if it found that he committed the federal narcotics felonies specified in Counts 2, 3, and 5, even though Count 1 of the indictment referred only to Counts 2 and 5 (Pet. 21-22). Petitioner failed to raise those objections at trial and accordingly may prevail only if the instructions constituted plain error. See Fed. R. Crim. P. 52(b); *United States v. Young*, 470 U.S. 1 (1985). Petitioner cannot satisfy that standard.

a. Section 848, the continuing criminal enterprise statute, requires the jury to find, among other things, that a defendant has committed a felony violation of Title 21 and that "such violation is a part of a continuing series of violations" of Title 21 (21 U.S.C. 848(b)(1) and (2)). The courts have generally held that a "continuing series of violations" consists of three or more felony violations of the narcotics laws. See, e.g., *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States v. Chagra*, 653 F.2d 26, 27-28 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982). Petitioner asserts that the trial court's instructions permitted the jury to rely on the overt acts alleged in Count 2 of the indictment—two of which were not Title 21 felonies—as predicate acts for the continuing criminal enterprise conviction. That is not so. The court correctly instructed the jury that to find a continuing series of violations, it must "find beyond a reasonable doubt that the defendant Samuel Scallio committed three or more successive violations of the federal narcotics laws" (C.A. App. 309). To be sure, the trial court had earlier instructed that "[e]ach of the overt acts described in the conspiracy count of the indictment alleges a felony violation of the federal laws" (*id.* at 308). That statement, although unnecessary, plainly did not advise the jury that the overt acts contained in Count 2 could be used to estab-

lish the continuing series of Title 21 felonies required to prove a Section 848 violation. Viewed in their entirety (see *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973)), the instructions made it clear to the jury that only violations of Title 21 could serve as predicate offenses for a conviction under Section 848. Certainly any possible ambiguity in the instructions on that score was not sufficient to constitute plain error. See *United States v. Young*, 470 U.S. at 15.<sup>2</sup>

b. The district court likewise did not commit plain error when it instructed the jury that it could convict petitioner under Section 848 (Count 1) if it found that he had committed at least one of the narcotics violations alleged in Counts 2, 3, and 5 of the indictment, even though Count 1 of the indictment referred only to Counts 2 and 5 as predicate acts. An indictment charging a violation of Section 848 need not list all, or even any, of the predicate acts. See *United States v. Rosenthal*, 793 F.2d 1214, 1226-1227 (11th Cir. 1986), cert. denied, No. 86-5872 (Mar. 9, 1987); *United States v. Becton*, 751 F.2d 250, 256 (8th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States v. Sterling*, 742 F.2d 521, 526 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985). It was sufficient that Count 1 tracked the language of Section 848 and that the district court correctly instructed the jury on the elements of that crime. Moreover, as the court of appeals explained

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<sup>2</sup> *United States v. Webster*, 639 F.2d 174 (4th Cir.), cert. denied, 454 U.S. 857 (1981), modified on other grounds on reh'g, 669 F.2d 185 (4th Cir. 1982), is not to the contrary. There, unlike here, the instructions expressly permitted the jury to rely on violations not contained in Title 21 in deciding whether to convict the defendant under Section 848. Moreover, even in the *Webster* case, the court of appeals upheld the Section 848 conviction, finding (639 F.2d at 181) that the jury had convicted the defendant on a "plenitude of counts" that were sufficient predicates under Section 848.

(Pet. App. C6), petitioner was not prejudiced by the court's instructions, since the jury convicted him on Count 2, which was specified as a predicate in Count 1 of the indictment.

2. Petitioner challenges the sufficiency of the evidence that he organized, supervised, or managed five or more persons in the continuing criminal enterprise. The court of appeals rejected that claim after a meticulous examination of the record (Pet. App. C4-C5). In particular, it found that petitioner had used Butch Phillips as his "lieutenant"; that petitioner's wife had purchased dilutant for the cocaine and had made certain financial arrangements relating to the cocaine operation; and that Jackie, Pete, and Billy Grimes had received money from petitioner and had delivered cocaine to him (*id.* at C4-C5, C8-C9). Petitioner's fact-bound challenge to the court's determination of the sufficiency of the evidence does not warrant further review.

3. a. Petitioner contends (Pet. 24-25) that the district court erred when it excluded the testimony of a witness he had called to challenge the veracity of Jackie Grimes, a government witness. The court of appeals agreed (Pet. App. C10) that testimony about the witness's poor reputation for truthfulness was admissible under Fed. R. Evid. 608, but it held that the trial court's failure to admit that testimony was harmless on the facts of this case. That decision is plainly correct. As the court noted (Pet. App. C10), the testimony of Jackie Grimes was largely cumulative, and her credibility was extensively challenged in other ways by petitioner. See *United States v. Basic Construction Co.*, 711 F.2d 570, 574-575 (4th Cir.), *certs. denied*, 464 U.S. 956 and 1008 (1983); *Osborne v. United States*, 542 F.2d 1015, 1018 (8th Cir. 1976).<sup>3</sup>

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<sup>3</sup> *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981), on which petitioner relies (Pet. 24-25), is not to the contrary. In *Davis*, the court of appeals found that the impeachment testimony that was excluded

b. Petitioner also claims that the district court erred when it precluded him from offering an allegedly exculpatory statement by Pete Grimes. The statement, according to petitioner's proffer, was a post-conspiracy remark by Grimes to a Drug Enforcement Agency (DEA) agent that the DEA "got the wrong man" when it arrested petitioner. The court of appeals correctly found the ruling excluding that statement to be harmless error (Pet. App. C10). The statement, made to law enforcement agents after the termination of the conspiracy, was not made under circumstances providing significant assurances of trustworthiness. In the face of the overwhelming evidence of petitioner's guilt, the exclusion of that single remark could not have prejudiced petitioner.

4. Petitioner asserts (Pet. 26-29) that his Fifth Amendment rights were violated when the trial court directed him to answer the government's questions during cross-examination regarding his tax returns. Neither petitioner nor his attorney, however, raised a Fifth Amendment objection to the government's cross-examination.<sup>4</sup> Petitioner

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by the district court involved the "key government witness, \* \* \* without whom the government would have had no case" (639 F.2d at 244). The court of appeals also held that under the Compulsory Process Clause of the Sixth Amendment, the district court lacked the authority to preclude defense testimony as a sanction for disobeying a discovery order—a result that cannot be squared with this Court's recent decision in *Taylor v. Illinois*, No. 86-5963 (Jan. 25, 1988).

<sup>4</sup> Petitioner acknowledges (Pet. 27-28) that his counsel made no objection at all, but insists that he objected himself when, during the examination, he remarked to the trial court "Is this a tax case I am in?" Even if that remark had been intended as a serious objection, it addressed only the relevance of the government's questions, not the tendency of those questions to incriminate petitioner, in violation of the Fifth Amendment. As such, petitioner's comment did not "make[ ] known to the court the action which [he] desire[d] the court to take or [his] objection to the action of the court and the grounds therefor" (Fed. R. Crim. P. 51; Fed. R. Evid. 103(a)(1)).



must therefore show that the questions concerning his tax returns constituted plain error. He has not made such a showing. Petitioner's fraudulent tax practices were relevant to impeach his credibility generally (see Fed. R. Evid. 608(b)), and they undermined petitioner's defense that he had obtained legitimate income from his wholesale car business. And by testifying at trial in his own defense, petitioner waived his Fifth Amendment privilege against compulsory self-incrimination with respect to all relevant inquiries on cross-examination. See, e.g., *Brown v. United States*, 356 U.S. 148 (1958); *Johnson v. United States*, 318 U.S. 189, 195 (1943); *Fitzpatrick v. United States*, 178 U.S. 304, 314-316 (1900). Petitioner's failure to object to those questions is thus "not 'waiver' of a right which had been denied but recognition that the action of the trial judge [in directing him to answer] was unexceptionable." *Johnson v. United States*, 318 U.S. at 203 (Frankfurter, J., concurring).

### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

WILLIAM F. WELD  
*Assistant Attorney General*

J. DOUGLAS WILSON  
*Attorney*

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